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HARVARD

Feb. 12

73

REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION,

September Term, 1898;

FOR THE

MIDDLE DIVISION,

December Term, 1898;

AND FOR THE

WESTERN DIVISION,

April Term, 1899.

GEORGE W. PICKLE,

ATTORNEY-GENERAL AND REPORTER.

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Fitzpatrick, Dearin *v.*	Meigs, 559	724
Fletcher, Kelley *v.*	94 Tenn., 5	466
Flowers *v.* Wilkes	1 Swan, 408	88
Forgasson, Sanders *v.*	3 Bax., 249	723
Forsey *v.* Luton	2 Head, 184	701
Foster, Ellis *v.*	7 Heis., 131	428
Foster, Railroad *v.*	88 Tenn., 680	197
Foster *v.* Water Co.	3 Lea, 48	291
Fowlkes, Powell *v.*	5 Bax., 649	136
Franklin *v.* Franklin	91 Tenn., 129	713
Franklin, Joiner *v.*	12 Lea, 422	723
Frierson *v.* Harris	5 Cold., 146	695
Frierson, Steele *v.*	85 Tenn., 438	466
Fry *v.* McCord	95 Tenn., 678	1
Fulghum *v.* Cotton	6 Lea, 590	433
Fulghum, Hall *v.*	86 Tenn., 451	601
Fulghum *v* Mayor	8 Lea, 640	181
Fulghum, White *v.*	87 Tenn., 282	601
Fulks, Spurlock *v.*	1 Swan, 291	466

G.

Gardner *v.* Barger	4 Heis., 672	362
Garner *v.* Garner	1 Lea, 30	286
Garrett *v.* Vaughn	1 Bax., 113	83
Gaslight Co., Caulkins *v.*	95 Tenn., 93	130
Gee *v.* Graves	2 Head, 238	311
Gentry *v.* Gentry	1 Sneed, 87	725
Gillespie *v.* State	8 Yer., 507	417
Glass, Federlich *v.*	13 Lea, 488	490
Goodall *v.* Thurman	1 Head, 209	417
Goodwin, Allen *v.*	92 Tenn., 385, 387	378, 380
Gower, Vick *v.*	92 Tenn., 391	112
Grace *v.* Hale	2 Hum., 546	581
Graham *v.* McReynolds	88 Tenn.	527
Graves, Gee *v.*	2 Head, 238	311
Gray *v.* Knoxville	85 Tenn., 101	222

Gray, Smitheal *v.*	**1 Hum., 491**	**713**
Green, Murphy *v.*	**2 Bax, 403**	**724**
Green *v.* Shaver	**3 Hum., 138**	**118**
Greer, Rhea *v.*	**86 Tenn., 59**	**141**
Griffith *v.* Association	**100 Tenn., 412**	**712**
Grimstead *v.* Huggins	**13 Lea, 728**	**428**
Grubb, Robinson *v.*	**8 Bax., 19**	**318**
Guadalupe, Albitztigui *v.*	**92 Tenn., 605**	**546**

H.

Hailey, Railroad *v.*	**94 Tenn., 383**	**40**
Hale, Grace *v.*	**2 Hum., 27**	**581**
Hall *v.* Fulghum	**86 Tenn., 451**	**601**
Hamilton, Insurance Co. *v.*	**5 Sneed, 269**	**23**
Hammon *v.* Hopkins	**3 Yer., 525**	**725**
Hamrice *v.* Laird	**10 Yer., 222**	**723**
Handman, Railroad *v.*	**13 Lea, 423**	**257**
Handwerker *v.* Diermeyer	**96 Tenn., 617**	**723**
Hannah *v.* State	**11 Lea, 201**	**454**
Hannum *v.* State	**90 Tenn., 648, 649**	**455, 612**
Hardin, Cherry *v.*	**4 Heis., 202**	**263**
Hardin *v.* Williams	**5 Heis., 388**	**362**
Hargo, Rogers *v.*	**92 Tenn., 35**	**176**
Harmon *v.* Railroad	**87 Tenn., 614**	**342**
Harriman, Hill *v.*	**95 Tenn., 305**	**587**
Harris, Frierson *v.*	**5 Cold., 146**	**695**
Harris *v.* McClanahan	**11 Lea, 185**	**169**
Harrison, Pope *v.*	**16 Lea, 82**	**169**
Harrison, Stephenson *v.*	**3 Head, 729**	**701**
Harris, Railroad *v.*	**99 Tenn., 696**	**680**
Harris *v.* State	**7 Lea, 538**	**454**
Harris *v.* State	**96 Tenn., 517**	**212**
Hartenstein, Tarbox *v.*	**4 Bax., 78**	**354**
Hassel, Phillips *v.*	**10 Hum., 197**	**724**
Hayes *v.* Cartwright	**6 Lea, 145**	**587**
Haynes, Dunlap *v.*	**4 Heis., 476**	**496**
Heidell, Wiley *v.*	**12 Heis., 99**	**581**
Henderson *v.* Rice	**1 Cold., 223**	**490**
Henderson, State *v.*	**15 Lea, 277**	**212**

Henley *v.* State	98 Tenn., 702–704	612
Hickerson, Hillsman *v.*	3 Head, 575	695
Hickman *v.* Perrin	6 Cold., 135	88
High *v.* Batte	10 Yer., 334	713
Hicks, Nance *v.*	1 Head, 624	362
Hill *v.* Harriman	95 Tenn., 305	587
Hillsman *v.* Hickerson	3 Head, 575	695
Hilton *v.* Duncan	1 Cold., 321	581
Hoard *v.* State	15 Lea, 318	417
Hodge, *v.* Dillon	Cooke, 281	362
Hogel *v* Hort	2 Bax., 473	743
Hollingsworth *v.* Mith	5 Sneed, 472	723
Holmark *v.* Molin	5 Cold., 484	495
Hook *v.* Donaldson	9 Lea, 56	581
Hopkins, Hammond *v.*	3 Yer., 525	725
Hopkins *v.* Railroad	96 Tenn., 420	368
Hopper *v.* Fisher	2 Head, 256	169
Hort, Hogel *v.*	2 Bax., 473	743
House, Railroad *v.*	96 Tenn., 552, 555	197
Houston *v.* Aycock	5 Sneed, 412	428
Howell *v.* Thompson	95 Tenn., 396	83
Huddleston, Rainer *v.*	4 Heis., 223	596
Hudson, Coleman *v.*	2 Sneed, 465	354
Huggins, Grimstead *v.*	13 Lea, 728	428
Hughes, Bank *v.*	2 Cold., 55	362
Hughes *v.* Cannon	1 Sneed, 622	354
Hughes, McKnight *v.*	4 Lea, 525	118
Hughes, Railroad *v.*	94 Tenn., 450	197
Hume *v.* Bank	9 Lea, 742	545
Hume *v.* Bank	13 Lea, 496	286
Humes *v.* Knoxville	1 Hum., 403	222
Hunt, Childress *v.*	2 Swan, 487	428

I.

Ingram *v.* Morgan	4 Hum., 65	445
Insurance Co., Dale *v.*	95 Tenn., 38	245
Insurance Co. *v.* Hamilton	5 Sneed, 269	23
Insurance Co., Memphis *v.*	6 Bax., 527	154, 680
Insurance Co. *v.* Munday	5 Cold., 547	629

Insurance Co. *v.* Spratley	99 Tenn., 322	644
Insurance Co. *v.* Underwood	12 Heis., 424	643
Iron Co., Young *v.*	85 Tenn., 189	102
Irvine *v.* Shrum	97 Tenn., 263	297

J.

Jackson *v.* Pool	91 Tenn., 452	612
Jefferson, Bank *v.*	92 Tenn., 537	45, 392
Johl *v.* Fernberger	10 Heis., 37	538
Johnson, Croft *v.*	8 Bax., 394	664
Johnson, Nicks *v.*	3 Sneed, 326	362
Johnson *v.* Patterson	13 Lea, 626	428
Jackson, Roberts *v.*	3 Yer., 79	428
Johnson *v.* State	11 Lea, 47	417
Johnson *v.* State	94 Tenn., 499	515
Jones, Chappel *v.*	8 Hum., 107	362
Jones, Bank *v.*	1 Swan, 391	389
Jones, Clark *v.*	93 Tenn., 642	297, 306
Jones *v.* Stockton	6 Lea, 133	466
Johnson, Traynor *v.*	1 Head, 52	725
Joiner *v.* Franklin	12 Lea, 422	723
Jones *v.* Ward	10 Yer., 168	723
Jordan, Knight *v.*	6 Hum., 101	83

K.

Katzenberger, Railroad *v.*	16 Lea, 380	2
Keezee *v.* Board	6 Cold., 127	188
Keith *v.* Fitzhugh	15 Lea, 49	286
Kelley *v.* Fletcher	94 Tenn., 5	466
Kelly, Railroad *v.*	91 Tenn., 699	495
Kesee, Bradley *v.*	5 Cold., 226	118
Kilcrease *v.* Blythe	6 Hum., 389	169
Kimbrough, Memphis *v.*	12 Heis., 133	291
Kimbrough *v.* Mitchell	1 Head, 541	689
Kindell *v.* Titus	9 Heis., 727	169
Kirkpatrick *v.* McCullough	3 Hum., 171	608
Knight *v.* Jordan	6 Hum., 101	83
Knox *v.* Coal Co.	90 Tenn., 546	368
Knoxville, Gray *v.*	85 Tenn., 101	222
Knoxville, Humes *v.*	1 Hum., 403	222

L.

Lafferty *v.* Turley	3 Sneed, 157	725
Laird, Hamrice *v.*	10 Yer., 222	723
Landis, Stephens *v.*	14 Lea, 433	130
Lane *v.* Farmer	11 Lea, 568	723
Lawrence *v.* Dougherty	5 Yer., 434	608
Lemons *v.* State	97 Tenn.,——,	673
Lewis, State *v.*	10 Lea, 168	306
Lookout Mountain Hotel Co., Morrison *v.*	92 Tenn., 6	45
Lookout Mountain Hotel Co., Morrison Lumber Co. *v.*	92 Tenn., 9	392
Lumber Co., Bank *v.*	100 Tenn., 479	392
Luton, Forsey *v.*	2 Head, 184	701
Lynn *v.* Polk	8 Lea, 127	181

Mc.

McCaleb *v.* Crichfield	5 Heis., 288	724
McClure, Armstrong *v.*	4 Heis., 80	428
McClure *v.* State	1 Yer., 206	417
McCord, Fry *v.*	95 Tenn., 678	1
McClanahan, Harris *v.*	11 Lea, 185	169
McCullough, Kirkpatrick *v.*	3 Hum., 171	608
McDaniel *v.* Railroad	88 Tenn., 542	612
McElroy *v.* Melcor	7 Cold., 140	538
McFerrin *v.* White	6 Cold., 499	130
McGowan *v.* State	9 Yer., 185	454
McGan *v.* Marshall	7 Hum., 121	581
McGill, Taylor *v.*	6 Lea, 294, 301	102, 103
McKissick *v.* McKissick	6 Hum., 75	620
McKnight *v.* Hughes	4 Lea, 525	118
McLenden *v.* State	92 Tenn., 525	686
McNabb Coal Co., Vance *v.*	92 Tenn., 47	546
McReynolds, Graham *v.*	88 Tenn., 240	527
McReynolds, Rice *v.*	8 Lea, 36	723
McTeer, Comfort *v.*	7 Lea, 662	664
McVickers, Pesterfield *v.*	3 Cold., 205	291

M.

Magens & Co., Memphis Water Co. *v.*	15 Lea, 43	545
Malone *v.* Abbott	3 Hum., 533	118
Manchester Mills, Railroad *v.*	88 Tenn., 659	495
Marr *v.* Rucker	1 Hum., 348	83
Marr *v.* Telegraph Co.	85 Tenn., 538	442
Marshall, McGan *v.*	7 Hum., 121	581
Masson *v.* Anderson	3 Bax., 290	725
Mayor *v.* Althrop	5 Cold., 554	181
Mayor, Fulghum *v.*	8 Lea, 640	181
Mayor *v.* Pearl	11 Hum., —	686
Mayor *v.* Shepherd	3 Bax., 373	612
Mays, Weeks *v.*	87 Tenn., 442	689
Meacham, Railroad *v.*	91 Tenn., 428	40
Melcor, McElroy *v.*	7 Cold., 140	538
Mellon, Telegraph Co. *v.*	96 Tenn., 68	442
Memphis *v.* Bank	91 Tenn., 551, 556	154, 680
Memphis *v.* Insurance Co.	6 Bax., 527	154, 680
Memphis *v.* Kimbrough	12 Heis., 133	291
Memphis, Public Ledger *v.*	93 Tenn., 81	181
Memphis Water Co. *v.* Magens & Co.	15 Lea, 43	545
Merritt *v.* Duncan	7 Heis., 156	130
Mette *v.* Dow	9 Lea, 101	490
Mfg. Co., Citty *v.*	93 Tenn., 276	354
Mitchell, Kimbrough *v.*	1 Head, 541	689
Mith, Hollingsworth *v.*	5 Sneed, 472	723
Molin, Holmark *v.*	5 Cold., 484	495
Montgomery *v.* Realhafer	85 Tenn., 668	118
Moore, Ferguson *v.*	98 Tenn., 343, 350	1, 3
Morgan, Ingram *v.*	4 Hum., 65	445
Morgan *v.* Pickard	86 Tenn., 208	212, 236, 237
Morrison *v.* Lookout Mountain Hotel Co.	92 Tenn., 6	45
Morrison Lumber Co. *v.* Lookout Mountain Hotel Co.	92 Tenn., 9	392
Morrow, Street R. Co. *v.*	87 Tenn., 417	154

Moses, Bearden *v.*	7 Lea, 459	445
Moses, Wrompelmier *v.*	3 Bax., 470	389
Moulden, Simpson *v.*	3 Cold., 429	608
Munday, Insurance Co. *v.*	5 Cold., 547	629
Mundinger, Scheibler *v.*	86 Tenn., 674	450
Murphy *v.* Green	2 Bax., 403	724
Murphy *v.* State	7 Cold., 516	673

N.

Nance *v.* Hicks	1 Head, 624	362
Nashville *v.* Comar	88 Tenn., 418	342
Nashville *v.* Smith	86 Tenn., 213	146
Nashville Trust Co., Prichett *v.*	96 Tenn., 477	701
Nealis, Reinhardt *v.*	*Ante*, p. 169	515
Neely *v.* State	4 Bax., 174	612
Nelson *v.* State	2 Swan, 481	454
Nichol *v.* Davidson County	8 Lea, 389	523
Nichol *v.* Nichol	4 Bax., 158	664
Nichol *v.* Stegar	6 Lea, 396	581
Nicks *v.* Johnson	3 Sneed, 326	362
Norfleet *v.* State	4 Sneed, 340	417
Northington, Railroad *v.*	91 Tenn., 56	380
Norton, Anderson *v.*	15 Lea, 28	546
Norvill, VanWych *v.*	2 Hum., 195	130

O.

Odom *v.* Owen	2 Bax., 450	664
Oppenheimer *v.* Bank	97 Tenn., 97	130
Overton *v.* Perkins	10 Yer., 329	118
Owen, Odom *v.*	2 Bax., 450	664

P.

Palmer, Caldwell *v.*	6 Lea, 658	725
Parham *v.* Pulliam	5 Cold., 497	306
Parker *v.* Bethel Hotel Co.	96 Tenn., 252	725
Parker *v.* Elder	11 Hum., 546	581
Parker *v.* Railroad	13 Lea, 670	206
Parrish *v.* State	12 Lea, 655	417
Patterson, Johnson *v.*	13 Lea, 626	428

Payne, Thornton *v.*	6 Lea, 284	546, 554
Pearce, Weakley *v.*	5 Heis., 415	466
Pearl, Mayor *v.*	11 Hum., —	686
Pearson, Perry *v.*	1 Hum., 431	466
Pennebaker *v.* Tomlinson	1 Tenn. Ch., 603	118
Perkins, Overton *v.*	10 Yer., 329	118
Perkins *v.* State	9 Bax., 3	211, 230
Perrin, Hickman *v.*	6 Cold., 135	88
Perry *v.* Pearson	1 Hum., 431	466
Pesterfield *v.* McVickers	3 Cold., 205	291
Phillips *v.* Hassel	10 Hum., 197	724
Pickard, Morgan *v.*	86 Tenn., 208, 212	236, 237
Pigue *v.* Young	85 Tenn., 263	318
Pilcher *v.* Smith	2 Head, 208	581
Pillow *v.* Thomas	1 Bax., 122	724
Pitcher *v.* Smith	2 Head, 208	490
Polk, Lynn *v.*	8 Lea, 127	181
Pool, Jackson *v.*	91 Tenn., 452	612
Pope *v.* Harrison	16 Lea, 82	169
Pope, Taylor *v.*	5 Cold., 413	130
Porter *v.* Duke	99 Tenn., 24	433
Postal Tel. Co. *v.* Zopfi	93 Tenn., 374	495
Post *v.* Building & Loan Asso.	97 Tenn., 408	176
Powell *v.* Fowlkes	5 Bax., 649	136
Pratt, Railroad *v.*	85 Tenn., 9	263
Prichett *v.* Nashville Trust Co.	96 Tenn., 477	701
Public Ledger *v.* Memphis	93 Tenn., 81	181
Puckett *v.* Richardson	6 Lea, 58	118
Puckett, State, *ex rel.*, *v.*	7 Lea, 709	212
Pulliam, Parham *v.*	5 Cold., 497	306

Q.

Quarles *v.* Clayton	87 Tenn., 308	601
Queen *v.* Coal & Iron Co.	95 Tenn., 458	496
Queen *v.* Dayton Coal Co.	95 Tenn., 458	273

R.

Ragsdale, State *v.*	10 Lea, 671	673
Railroad *v.* Adams	3 Head, 596, 597	206, 222

Railroad, Anderson *v.*	91 Tenn., 54	466
Railroad *v.* Bingham	87 Tenn., 522, 526	222, 412
Railroad *v.* Bolton	99 Tenn., 277	380
Railroad, Carriger *v.*	7 Lea, 388	342
Railroad, Clingan *v.*	2 Lea, 726	612
Railroad *v.* Cochrane	3 Lea, 479	206
Railroad, Colcough *v.*	2 Head, 172	206
Railroads *v.* Crider	91 Tenn., 489, 496	197, 473
Railroad *v.* Dies	91 Tenn., 180	2
Railroad, Dunn *v.*	3 Bax., 415	612
Railroad, Eichengreen *v.*	96 Tenn., 229	2
Railroad *v.* Elliott	1 Cold., 611	368
Railroad *v.* Foster	88 Tenn., 680	197
Railroad *v.* Hailey	94 Tenn., 383	40
Railroad *v.* Handman	13 Lea, 423	257
Railroad, Harmon *v.*	87 Tenn., 614	342
Railroad *v.* Harris	99 Tenn., 696	680
Railroad, Hopkins *v.*	96 Tenn., 420	368
Railroad *v.* House	96 Tenn., 552, 555	197
Rainer *v.* Huddleston	4 Heis., 223	596
Railroad *v.* Hughes	94 Tenn., 450	197
Railroad *v.* Katzenberger	16 Lea, 380	2
Railroad *v.* Kelly	91 Tenn., 699	495
Railroad *v.* Manchester Mills	88 Tenn., 659	495
Railroad, McDaniel *v.*	88 Tenn., 542	612
Railroad *v.* Meacham	91 Tenn., 428	40
Railroad *v.* Northington	91 Tenn., 56	380
Railroad, Parker *v.*	13 Lea, 670	206
Railroad *v.* Pratt	85 Tenn., 9	263
Railroad *v.* Russell	92 Tenn., 110	197
Railroad, Simms *v.*	12 Heis., 621	206
Railroad, Smith *v.*	91 Tenn., 221	130
Railroad, Spain *v.*	1 Shannon, 181	412
Railroad *v.* Spence	93 Tenn., 173	407
Railroad, State *v.*	96 Tenn., 385	149
Railroad *v.* Staub	7 Lea, 397	354
Railroad *v.* Wilson	88 Tenn., 316	40
Ramsey *v.* Clark	4 Hum., 243	130

Realhafer, Montgomery *v.*	85 Tenn., 668	118
Reeves *v.* Dougherty	7 Yer., 222	83
Reinhardt *v.* Nealis	*Ante*, p. 169	515
Rhea *v.* Greer	86 Tenn., 59	141
Rice, Henderson *v.*	1 Cold., 223	490
Rice *v.* McReynolds	8 Lea, 36	723
Richardson, Ellett *v.*	9 Bax., 293	490
Richardson, Puckett *v.*	6 Lea, 58	118
Riddle *v.* State	3 Heis., 401	417
Roberts *v.* Jackson	3 Yer., 79	428
Roberts, State *v.*	11 Hum., 541	538
Robertson, Epperson *v.*	91 Tenn., 407	433
Robertson *v.* State	4 Lea, 425	454
Robertson *v.* Winchester	85 Tenn., 187	169
Robinson, Boyd *v.*	93 Tenn., 2	334
Robinson *v.* Grubb	8 Bax., 19	318
Rogers *v.* Hargo	92 Tenn., 35	176
Rogers *v.* Winton	2 Hum., 178	713
Rowell, Carrigan *v.*	96 Tenn., 185	523
Rucker, Marr *v.*	1 Hum., 348	83
Ruffin, Coffin *v.*	4 Cold., 487	596
Ruohs *v.* Athens	91 Tenn., 20	707
Russell, Railroad *v.*	92 Tenn., 110	197
Russell, Saunders *v.*	10 Lea, 299	146

S.

Sanders *v.* Forgasson	3 Bax., 249	723
Saunders *v.* Russell	10 Lea, 299	146
Sautelle *v.* Carlisle	13 Lea, 391	490
Scheibler *v.* Mundinger	86 Tenn., 674	450
Schmalzreid *v.* White	97 Tenn., 45	496
Schults *v.* Blackford	9 Lea, 431	433
Scott *v.* Buchanan	11 Hum., 468	581
Scott, Cox *v.*	9 Bax., 305	723
Scott, State *v.*	98 Tenn., 254, 256	189, 564
Sharon, Adams *v.*	89 Tenn., 335	511
Shaver, Green *v.*	3 Hum., 138	118
Shepherd, Mayor *v.*	3 Bax., 373	612

Shields *v.* Thompson	4 Bax., 227	428
Shrum, Irvine *v.*	97 Tenn., 263	297
Simms *v.* Railroad	12 Heis., 621	206
Simpson *v.* Moulden	3 Cold., 429	608
Smith *v.* Evans	5 Hum., 70	581
Smitheal *v.* Gray	1 Hum., 491	713
Smith, Nashville *v.*	86 Tenn., 213	146
Smith, Pilcher *v.*	2 Head, 208	581
Smith, Pitcher *v.*	2 Head, 208	490
Smith *v.* Railroad	91 Tenn., 221	130
Smith, Transportation Co. *v.*	16 Lea, 498	2
Snell *v.* Allen	1 Swan, 208	118
Snodgrass, Bancroft *v.*	1 Cold., 430	546
Solinsky *v.* Bank	85 Tenn., 372	83
Spain *v.* Railroad	1 Shannon, 181	412
Spence, Railroad *v.*	93 Tenn., 173	407
Spencer *v.* State	15 Lea, 539	417
Sporer *v.* Eifler	1 Heis., 636	490
Spratley, Insurance Co. *v.*	99 Tenn., 322	644
Spurgeon, State *v.*	99 Tenn., 659	515
Spurlock *v.* Fulks	1 Swan, 291	466
Stanley *v.* Donoho	16 Lea, 495	150
State. Avery *v.*	7 Bax., 328	230
State, Bank *v.*	9 Yer., 490	154
State *v.* Bank	95 Tenn., 226, 231	154, 155
State, Brakefield *v.*	1 Sneed, 215	417
State, Butler *v.*	7 Bax., 35	454
State *v.* Butler	13 Lea, 400	154
State *v.* Butler	86 Tenn., 631	154
State, Calhoun *v.*	4 Hum., 477	417
State, Cantrell *v.*	2 Shannon, 249	417
State, Cartwright *v.*	12 Lea, 620	417
State, Dale *v.*	10 Yer., 550	454
State, Deman *v.*	3 Leg. Rep., 184	455
State, Draper *v.*	4 Bax., 246	417
State *v.* Farris	4 Lea, 183	236
State, Gillespie *v.*	8 Yer., 507	417
State, Hannah *v.*	11 Lea, 201	454

State, Hannum *v.*	90 Tenn., 648, 649	455, 612
State, Harris *v.*	7 Lea, 538	454
State, Harris *v.*	96 Tenn., 517	212
State *v.* Henderson	15 Lea, 277	212
State, Henley *v.*	98 Tenn., 702, 704	612
State, Hoard *v.*	15 Lea, 318	417
State, Johnson *v.*	11 Lea, 47	417
State, Johnson *v.*	94 Tenn., 499	515
State, Lemons *v.*	97 Tenn., —	673
State *v.* Lewis	10 Lea, 168	306
State, McClure *v.*	1 Yer., 206	417
State, McGowan *v.*	9 Yer., 185	454
State, McLenden *v.*	92 Tenn., 525	686
State, Murphy *v.*	7 Cold., 516	673
State, Neely *v.*	4 Bax., 174	612
State, Nelson *v.*	2 Swan, 481	454
State, Norfleet *v.*	4 Sneed, 340	417
State, Parrish *v.*	12 Lea, 655	417
State, Perkins *v.*	9 Bax., 3	211, 230
State, *ex rel.*, *v.* Puckett	7 Lea, 709	212
State *v.* Ragsdale	10 Lea, 671	673
State *v.* Railroad	96 Tenn., 385	149
State, Riddle *v.*	3 Heis., 401	417
State *v.* Roberts	11 Hum., 541	538
State, Robertson *v.*	4 Lea, 425	454
State *v.* Scott	98 Tenn., 254, 256	189, 564
State, Spencer *v.*	15 Lea, 539	417
State *v.* Spurgeon	99 Tenn., 659	515
State, Stout *v.*	91 Tenn., 405	229
State *v.* Turner	6 Bax., 203	495
State, Ward *v.*	1 Hum., 253	417
State, Wattingham *v.*	5 Sneed, 564	673
State, Withers *v.*	3 Leg. Rep., 106	455
Staub, Railroad *v.*	7 Lea, 397	354
Steele *v.* Frierson	85 Tenn., 438	466
Stegar, Nichol *v.*	6 Lea, 396	581
Stephens *v.* Landis	14 Lea, 433	130
Stephenson *v.* Harrison	3 Head, 729	701

Stockell, Bank *v.*	92 Tenn., 256	445
Stockton, Jones *v.*	6 Lea, 133	466
Stout *v.* State	91 Tenn., 405	229
Street R. Co. *v.* Morrow	87 Tenn., 417	154
Stovall, Fisher *v.*	85 Tenn., 316	664
Suttle, Aiken *v.*	4 Lea, 103, 120	490, 581
Swafford *v.* Ferguson	3 Lea, 294	581
Swepson *v.* Bank	9 Lea, 714, 723	88

T.

Tarbox *v.* Hartenstein	4 Bax., 78	354
Tavel, Ferris *v.*	87 Tenn., 386	445
Taylor *v.* Chandler	9 Heis., 366	188
Taylor *v.* McGill	6 Lea, 294, 301	102, 103
Taylor *v.* Pope	5 Cold., 413	130
Tel. Co. *v.* Barnes	95 Tenn., 271	495
Telegraph Co., Marr *v.*	85 Tenn., 538	442
Telegraph Co. *v.* Mellon	96 Tenn., 68	442
Telegraph Co. *v.* Turner	88 Tenn., 265	644
Telephone Co. *v.* Turner	88 Tenn., 266	102
Tenn. C. & I. Co., Brewer *v.*	97 Tenn., 615	257
Thomas, Pillow *v.*	1 Bax., 123	724
Thompson, Evans *v.*	12 Heis., 536	263
Thompson, Howell *v.*	95 Tenn., 396	83
Thompson, Shields *v.*	4 Bax., 227	428
Thornton *v.* Payne	6 Lea, 284	546, 554
Thurman, Goodall *v.*	1 Head, 209	417
Tillman *v.* Cocke	9 Bax., 429	189
Tomlinson, Pennebaker *v.*	1 Tenn. Ch., 603	118
Titus, Kindell *v.*	9 Heis., 727	169
Trafford *v.* Young	3 Tenn., Ch., 501	713
Transportation Co. *v.* Smith	16 Lea, 498	2
Traynor *v.* Johnson	1 Head, 52	725
Tune *v.* Cooper	4 Sneed, 296	723
Turbeville, Anderson *v.*	6 Cold.. 158	222
Turley, Lafferty *v.*	3 Sneed, 157	725
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Turner, Telephone Co. *v.*	88 Tenn., 265, 266	102, 644

Tyler *v.* Dunton	1 Tenn. Ch., 361	118
Tyler, Wolfe *v.*	1 Heis., 313	608

U.

Underwood; Insurance Co. *v.*	12 Heis., 424	643

V.

Vance *v.* McNabb Coal Co.	92 Tenn., 47	546
VanValkenburg, Bradshaw *v.*	97 Tenn., 323	581
VanWych *v.* Norvill	2 Hum., 195	130
Vaughn, Garrett *v.*	1 Bax., 113	83
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W.

Wade *v.* Cantrell	1 Head, 345	723
Walt, Allen *v.*	9 Heis., 242	723
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Ward *v.* State	1 Hum., 253	417
Water Co., Foster *v.*	3 Lea, 48	291
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Webb, Boyers *v.*	1 Lea, 698	362
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Wells, Duff *v.*	7 Heis., 17	601
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White, Schmalzreid *v.*	97 Tenn., 45	496
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Whitman *v.* Childress	6 Hum., 303	608
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Wiley *v.* Bennett	9 Bax.	686
Wiley *v.* Heidell	12 Heis., 99	581
Wilkes, Flowers *v.*	1 Swan, 408	88
Williams, *ex parte*	1 Lea, 529	713
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Wynne *v.* Edwards	7 Hum., 418	466

Y.

Yates, Causey *v.*	8 Hum., 606	130
Young *v.* Iron Co.	85 Tenn., 189	102
Young, Pigue *v.*	85 Tenn., 263	318
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Z.

Zopfi, Postal Telegraph Co. *v.*	93 Tenn., 374	495

ERRATUM.

In Ford *v.* State, p. 454, read in fifth line of second headnote, "does not exclude," for "does exclude."

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION.

JACKSON, APRIL TERM, 1898.

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* RAILROAD *v.* RAY.

(*Jackson.* April 16, 1898.)

1. DECLARATION. *Claiming exemplary damages.*

It is necessary to set out in the declaration the facts constituting fraud, malice, oppression, etc., upon which a claim for exemplary damages is predicated, but it is not necessary that it be claimed in so many words that some or all of the damages are exemplary or punitive. (*Post, pp. 5, 6.*)

Cases cited and approved: 14 Am. St. Rep., 158; 19 Am. St. Rep., 306; 5 Am. St. Rep., 354.

Cited and distinguished: Burson *v.* Cox, 6 Bax., 360, 363; Ferguson *v.* Moore, 98 Tenn., 343, 350; Fry *v.* McCord, 95 Tenn., 678.

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*As to the liabilities to passengers on sleeping cars, there is a review of the authorities in a note to *Mann Boudoir Car Co.* v. *Dupre* (C. C. App., 5 C.), 21 L. R. A., 289.—REPORTER.

2. COMMON CARRIER. *Duty of its employes to passengers.*

A passenger of a train is not only entitled to civil treatment at the hands of all the employes, but to their protection, and the railroad company will be held liable for any acts of rudeness and oppression by its employes resulting in an injury to a passenger while on the train, since the safety and proper treatment of the passengers are within the scope of the employment and range of duties of every employe. (*Post*, *pp.* 7, 8.)

Cases cited and approved: Transportation Co. *v.* Smith, 16 Lea, 498; Eichengreen *v.* Railroad, 96 Tenn., 229; West Mem. Packet Co. *v.* White, 96 Tenn., 229; 44 Am. St. Rep., 489; 32 Am. St. Rep., 87; 42 Am. St. Rep., 33.

3. SAME. *Conductor or porter of sleeping car is servant of railroad company.*

The conductor or porter of a sleeping car is a servant of the company of whose train his car is for the time being a part, in all matters relating to the safety of its passengers. (*Post*, *pp.* 9, 10.

Cases cited and approved: Railroad *v.* Dies, 91 Tenn., 180; Railroad *v.* Katzenberger, 16 Lea, 380; 8 Am. St. Rep., 538; 51 Am. St. Rep., 303; 32 Am. Rep., 325.

4. CHARGE OF COURT. *Explanation of terms not required, when.*

It is not necessary for the Court to define the terms "gross negligence," "fraud," "malice," "cruel or wanton and oppressive conduct," in a charge on the right to punitive damages in an action against a railroad company, where, according to plaintiff's theory, he was rudely pushed or knocked off a train while in motion, and the defendant denies all negligence. (*Post*, *pp.* 6, 7.)

5. SAME. *Request properly refused, when.*

A requested instruction, in an action by a passenger against a railroad company for personal injuries, which, in effect, holds that it is incumbent on plaintiff to prove that the proximate cause of the injury was the want of something which, as a general rule, the carrier was bound to supply, or the presence of something which, as a general rule, it was bound to keep out of the way, is properly refused where the liability, if any, is for the positive misconduct of an employe, and not any defect in appliances, machinery, or equipment. (*Post*, *p.* 9.)

Railroad *v.* Ray.

6. EVIDENCE. *Of usual stopping place of train, competent.*

It is competent for a witness to state that a train, at night, usually stopped at a certain place, although he was not present upon the night to which the inquiry relates. (*Post, pp. 10, 11.*)

7. ARGUMENT OF COUNSEL. *Use of illustrations.*

The trial Court may, in its discretion, permit counsel to illustrate in argument the manner in which an accident may have occurred, by means of a desk in the courtroom, in addition to the articles used for that purpose by the witnesses. (*Post, p. 11.*)

Case cited and approved: Ferguson *v.* Moore, 98 Tenn., 350.

8. COSTS. *Of copy of stenographer's notes of evidence upon a mistrial.*

The Court has no authority to tax the cost of transcribing the stenographer's notes, furnished upon the plaintiff's demand, after a mistrial, against the defendant, at whose request the stenographer was employed, under Shannon's Code, §§ 4695 4697, providing that in case of appeal, a transcript of the stenographer's notes, if one has been employed at the request of a party, shall be made a part of the bill of exceptions, and the party at whose instance the stenographer was employed shall be responsible for his compensation for the work done by him, as the statute merely contemplates the case of an appeal. (*Post, pp. 14, 15.*)

Act construed: Acts 1887, Ch. 217.

Code construed: §§ 4695–4697 (S.).

FROM HAYWOOD.

Appeal in error from Circuit Court of Haywood County. JNO. R. BOND, J.

A. D. BRIGHT, H. J. LIVINGSTON, and MCCORRY & BOND for Railroad.

J. W. E. MOORE for Ray.

Railroad *v.* Ray.

WILKES, J. This is an action for damages for personal injury. It was tried before the Court and jury, and a verdict and judgment was rendered for $2,500, and the railroad company has appealed and assigned errors.

The facts, so far as necessary to be stated, are that plaintiff bought a coupon ticket from the Louisville & Nashville Railroad Company from Memphis to Jackson, Tenn., intending to stop at Humboldt and transfer, in the night time, to the Mobile & Ohio Railroad. He had fallen asleep on the train, and about ten o'clock, when it reached Brownsville, he awoke, and thinking he was, perhaps, at Humboldt, he went to the door of the car and got off on the north side, the platform being on the south side. Looking around, he found that he was mistaken as to the place. The train started about that time, and he attempted to board the coach again, when, according to his version, while on the steps or platform (and he could not be certain which), he was struck or shoved by a man wearing the uniform of a railroad employe, and his left hand was knocked loose from the railing. He swung around until his right hand was also twisted from the railing, and then fell on the ground, partly under the car, and his left hand was badly crushed, so that it was amputated, all but the thumb and little finger, and the latter was rendered perfectly stiff. He suffered great pain, and has virtually lost the use of his left hand.

The plaintiff was not able to say who it was that struck or pushed him, but thought it was a negro porter, and was certain the person had on the uniform of a railroad employe. The witness was shown the crew of the train and asked to identify the man who struck or pushed him, but was not able to do so. He was not able to give a very satisfactory or definite answer as to which end of the car he went out at, or attempted to re-enter. The theory of the railroad company is, that in attempting to board the train, he fell off, and was not struck or pushed, and evidence is introduced to show the whereabouts of all the train hands or crew, so as to demonstrate that it was impossible for any of them to be present at the time he says he was pushed off.

Eight errors are assigned by the defendant company. The first is to the effect that the Court charged the jury that if the injury was done by the defendant and was the result of gross negligence, fraud, or malice of the defendant, or was inflicted cruelly, wantonly and oppressively, they might give punitive or exemplary damages in addition to compensatory damages. This is said to be error because the declaration made no claim, in terms, for exemplary damages.

When special damages are claimed arising out of a special or peculiar state of facts, they must be averred before they can be proven. *Burson* v. *Cox*,

6 Baxter, 360, 363; *Ferguson* v. *Moore*, 14 Pickle, 343, 350; *Fry* v. *McCord*, 11 Pickle, 678.

There is, however, a difference between special damages and exemplary or punitive damages. Special damages are the natural, but not necessary, result of the injury complained of, and hence they must be specially alleged, in order that the defendant may have notice thereof and be prepared to meet the same upon the trial.

Exemplary or punitive damages are given as a punishment for fraud, malice, gross negligence, or oppression. They are not based upon the nature and extent of the injury so much as they are upon the oppression of the party who does the injury, and the basis is not so much compensation for any special injury as it is a punishment for the *mala fides* of the party doing the injury, and is visited upon him on grounds of public policy.

While it is necessary to set out in the declaration the facts constituting fraud, malice, oppression, etc., upon which the claim for exemplary damages is predicated, it is not necessary that it be claimed, in so many words, that some or all of the damages are exemplary or punitive. *Burson* v. *Cox*, 6 Baxter, 360; 5 Am. & Eng. Enc. Pl. & Prac., 723; *Savannah R. R. Co.* v. *Holland*, 14 Am. St. Rep., 158; *Southern Express Co.* v. *Brown*, 19 Am. St. Rep., 306; *Alabama R. R. Co.* v. *Arnold*, 5 Am. St. Rep., 354.

It is also said that the Court erred in not defin-

ing gross negligence, fraud, malice, cruel or wanton and oppressive conduct—terms used in the charge. We are of opinion that it was not necessary to give a definition of each or any of these terms as applicable to the facts of this case. If the plaintiff was rudely pushed or knocked off the train, the conduct would readily fall under either head. In addition, there was no request for such definition or the application of the terms to the facts of the case.

It is said that the Court erred in charging that if plaintiff was pushed from the train by any of the agents or employes of the train, acting in the scope of their employment or authority, the railroad company would be liable, and if done in a grossly negligent or oppressive manner, the railroad company would be liable for punitive damages. It is said the error consists in not stating what acts would be in the scope of the employe's authority or liability. And, in this connection, it is said a railroad company is not liable for the willful and malicious acts of a servant not authorized or approved or ratified by the master, but perpetrated to gratify the private malice of the servant under mere color of discharging a duty to the master. Unquestionably the latter proposition is correct law as an abstract proposition and when applied to trespassers or third persons not passengers, but there was no evidence tending to show, in this case, any private act of malice, or that the act was done by the wantonness of an individual. On the contrary, the defense was

that no injury was done in any way, and that it was a mere accident, due to plaintiff's carelessness. The plaintiff was a passenger, and the rule is that a passenger is not only entitled to civil treatment at the hands of all employes, but to their protection; and the railroad company will be held liable for any act of rudeness and oppression resulting in injury to a passenger at the hands of any of its employes while on the train, the safety and proper treatment of the passengers being within the scope of employment and range of duties of every employe. *White* v. *Norfolk Railway Co.*, 44 Am. St. Rep., 489; *Richmond Railway* v. *Jefferson*, 32 Am. St. Rep., 87; *Chicago Railroad Co.* v. *Flexman*, 42 Am. St. Rep., 33; *Transportation Co.* v. *Smith*, 16 Lea, 498; *Eichengreen* v. *L. & N. R. R.*, 12 Pickle, 229; *West Mem. Packet Co.* v. *White*, 41 S. W. Rep., 583.

In addition, it may be added that there was no request for additional instructions or for the explanation of terms. The defendant railroad company made four special requests, which were refused. The first in regard to the burden of proof; second, to the effect that proof of injury would not raise any presumption of negligence; third, that the crew of the sleeping car were not to be treated as a part of the crew of the train, and the railroad company would not be liable for their acts, especially in vindictive damages, and, fourth, that plaintiff must prove that he was injured in the manner set out in his declaration, if at all.

To be more specific, the first request, in substance, was that in case of an injury to a passenger it was incumbent to prove that the proximate cause of the injury was the want of something which as a general rule the carrier was bound to supply, or the presence of something which as a general rule the carrier was bound to keep out of the way.

It is evident that this request is a mere abstraction and has no applicability to the facts of this case. Here the liability, if any, is for the positive misconduct of an employe, and not any defect in appliances, machinery, or equipment.

The ground of the second request was fully covered by instructions in the general charge to the effect that the plaintiff must, in order to recover, prove that he was pushed or knocked off the train by one of the crew, and the jury must also find that it was done by one of the train crew acting in the scope of his employment. As just seen, this instruction was more favorable to the railroad company than the law warranted when the person injured or maltreated is a passenger.

The third request was that the jury be instructed that the conductor and porter of the sleeping car are not a part of the train crew of a railroad passenger train, and, in this connection, it is said the plaintiff could not recover if the wrong was done by either of these employes. The relevancy of this request arises out of the fact that while all of the train crew, except these employes, testified that they

did not push plaintiff off the train, the sleeping car conductor and porter were not examined. The request is not the law. It has been held, in a number of cases, that the conductor or porter of the sleeper is a servant of the railroad company of whose train his car is, at the time being, a part, in all matters relating to the safety of its passengers. *Williams* v. *Palace Car Co.*, 8 Am. St. Rep., 538; *Thorpe* v. *N. Y. Ry. Co.*, 32 Am. Rep., 325; *Evans. & Terre Haute Ry. Co.* v. *Alton*, 51 Am. St. Rep., 303; *Railroad* v. *Dix*, 7 Pickle, 180; *Railroad* v. *Katzenburger*, 16 Lea, 380.

As to the fourth request, so far as it is good law and applicable to the case, it was embraced in the general charge. The plaintiff must always prove that he was injured in the manner set out in the declaration; but this does not mean that he must make out his proof in the minutest detail to correspond with the statement in his declaration. The Court charged the jury that the plaintiff must prove his case as alleged in his declaration, and this was, in substance, several times repeated and made specific by adding that they must find that he was pushed or knocked off the train by some agent or employe of the company acting within the scope of his authority.

It is said it was error to allow Covington, the night watchman at Brownsville, to state, over objection, the point where the night train usually stopped. The witness was not present on the night of the in-

jury, but stated that the train, at night, usually stopped at a certain place, but could not state where it stopped that night. There was other proof to show where it did actually stop, and this does not appear to have been a matter of any serious importance. We are of opinion the evidence was not material, and also that it was not incompetent as a circumstance cumulative to other evidence so far as it had any bearing on the real issues involved.

It is said the Court erred in allowing the plaintiff's attorneys to illustrate the manner in which the plaintiff may have been hurt. This was done in the course of the argument, and by means of a desk in the courtroom, a part of its furniture. It seems that counsel for the plaintiff had used two chairs in illustrating their theory of the case, both in examining the witnesses and in the course of the argument, and counsel of railroad commented on it, and the use of the desk was an additional illustration by the plaintiff in his closing argument. The Court, over the protest of the defendant company, allowed the plaintiff to use the desk. This was a matter which addressed itself to the discretion of the trial Judge, and also to the credulity and sound sense of the jury. Within proper bounds, the Court will not interfere with the manner of presenting a case by counsel. *Ferguson* v. *Moore*, 14 Pickle, 350. And we are unable to see that any injury could result from such illustrations. As to whether they were plausible or not was for the jury to decide.

It is said, finally, that there is no evidence to support the verdict. From what has already been stated, it will be seen that the whole controversy must turn upon the question whether the plaintiff was pushed or knocked off the train by an employe of the railroad, or whether he fell off in his efforts to get back on the train after getting off himself. It is the testimony of all the trainmen, except the conductor and porter of the sleeping car, who did not testify, that they did not do it, and they give evidence to show that they were not at the place or in such position as to have done the act. On the contrary it is positively stated by the plaintiff that he was pushed off by one of the train crew in uniform. Much stress is laid upon the indefiniteness of the plaintiff's statement as to where he was when he was pushed off—that is, whether on the steps or platform of the car—and the fact that he could not identify any one of the crew as the person who did the act, although they were all shown to him. But we think the jury perhaps considered the facts that it was night, and more or less dark; that the plaintiff had been suddenly aroused from sleep; that he had become confused as to his whereabouts, thinking he was at Humboldt, when in fact he was at Brownsville; that he attempted hurriedly to re-enter the car when he ascertained his mistake; that he could not have been expected to be put off or pushed down, and that the whole matter occurred in a very short time, and that he may have been mistaken for a

tramp entering the train on the wrong side. The jury, in this view of the case, may very well have considered his statements sufficiently definite under all these circumstances.

It appears that the inside of the plaintiff's right hand was bruised as if it had been done by firmly grasping something which turned in his hand, and it is said that this tends to support his statement that he clung to the railing with that hand, but this might have happened on either theory. It is shown that several of the crew got off and back on the train at different places when the train was at Brownsville. One of the crew, Foreman, states that he was on the platform talking to the operator and ticket agent when the train was waiting, and, when the train started, he says he got on it on the front end of the rear car, which was the Nashville coach. His testimony, to some extent, is contradicted by Martin. The whole matter was submitted to the jury, and they have seen proper to believe the theory of the plaintiff, and it is plausible and has some evidence to support it.

It is said the verdict is excessive. We do not so regard it, looking at it in the light the jury must have regarded it, in order to give any verdict whatever. If the railroad was liable at all, it was for the improper and oppressive treatment of the plaintiff as a passenger, and, viewed from that standpoint, the verdict is not excessive, and the judgment is affirmed with costs.

A stenographer was sworn, under the Act of 1887, Chap. 217 (Shannon, § 4695–97), to take down the testimony in the case, at the instance and request of defendant. The statute provides that in such cases the stenographer shall be sworn to make a true, impartial, and complete stenographic report of all the oral testimony given in the cause. And, in case of appeal, a transcript of the stenographic notes shall be made part of the bill of exceptions, subject to correction by the presiding Judge, and the party alone at whose instance the stenographer was employed shall be responsible for his compensation for the work done by him.

On the second trial, which resulted in a mistrial, a stenographer was sworn, and, after mistrial was had, on motion of counsel for plaintiff, and over defendant's objection, the Court required him to transcribe his notes and file the same, and taxed the cost to the railroad.

It is now objected that the statute does not require the notes of the stenographer to be transcribed, except where appeal is taken, and that it was error to require it to be done in this case at the plaintiff's instance, and make the defendant pay the costs. We are of the opinion the Court, in this case should not have charged the cost of transcribing the stenographic notes into writing to the railroad company. There being a mistrial, and no appeal being possible, no transcript was necessary for purposes of appeal. It could only have been useful to either party

in preserving the testimony in view of a future trial. If either party desired, for this or other purpose, to have it transcribed, he should have been required to pay the cost of this transcribing, the other stenographer's cost being paid by the party by whom he was requested to do the work.

We are of opinion the trial Judge was in error in this matter of the cost of transcribing the notes, and this error will be corrected, and, in all other respects, the judgment of the Court below is affirmed, with costs.

OWNBY *v.* SUPREME LODGE K. OF H.

(*Jackson.* April 16, 1898.)

1. BENEFIT SOCIETIES. *Certificate for unauthorized beneficiary void.*

A benefit certificate that names as beneficiary a person not authorized by the charter and laws of the society to receive the benefit. is void. (*Post, p. 20.*)

2. SAME. *Beneficiary not a dependent, when.*

A benefit certificate in favor of one for whom the member is under no legal or moral obligation to provide, cannot be sustained as being for a person dependent upon the member, although the latter may have bestowed gifts and charities upon such person, and had contemplated and promised to bestow others. (*Post, pp. 18, 19.*)

Cases cited: 144 Ill., 355; 153 Mass., 314; 60 Mich., 44.

3. SAME. *Surrender and substitution of certificate by incompetent person void.*

The surrender of a benefit certificate, and substitution of a new one naming a different beneficiary, made by a member incapable, by reason of mental infirmity, of exercising judgment and discretion, is void, and does not defeat the rights of the beneficiary named in the first certificate. (*Post, pp. 19, 20.*)

FROM OBION.

Appeal from Chancery Court of Obion County. JNO. S. COOPER, Ch.

C. N. LANNOM and MOORE & WELLS for Ownby.

T. C. FRYAR & SON for Lodge.

McALISTER, J. This is a contest over a benefit certificate in the Knights of Honor. In 1879 one E. Offill became a member of a subordinate lodge in said order at Union City, and caused his benefit certificate to be made payable to his wife. In 1888 his wife died, and thereupon Offill surrendered said certificate, and had issued to him a second certificate, payable to his niece, Miss Caroline H. Offill. In August, 1895, Offill surrendered this certificate, and caused a third certificate to be issued, payable at his death to Miss Lena Mai Corum.

The constitution and laws of the Knights of Honor provide that benefit certificates may be made payable to three classes—first, to members of the family, second, to blood relatives, and third, to persons dependent on the beneficiary.

The present bill is filed on behalf of Miss Caroline Offill, to whom the second certificate was made payable, attacking the validity of the third and last certificate issued to Miss Lena Mai Corum, upon two grounds, namely:

(1) That when the second certificate was surrendered and the third certificate issued, the deceased was mentally unsound and incapable of comprehending the nature of the act, and that in his weak and enfeebled condition of mind and body, he was constrained to perform the act by the undue influence exercised over him by the relatives of Miss Lena Mai Corum.

(2) It is charged that the third certificate is void

because issued in contravention of the laws of the order to a beneficiary who was neither a member of his family, a blood relation, nor one dependent upon the assured.

The Chancellor decreed in favor of complainant, adjudging that the third and last certificate was void, and that Miss Caroline Offill, the beneficiary of the second certificate, was entitled to the fund.

As already stated, the constitution and laws of the Knights of Honor provide that the benefit certificate may be made payable to members of his family, blood relatives, or persons dependent on him (the member). The answer filed on behalf of Miss Lena Mai Corum admits that she was not related to the deceased and was not a member of his family, but lived with her parents, Dr. and Mrs. Corum. The contention made on behalf of Miss Corum is that she was a dependent on E. Offill within the meaning of the laws of the Knights of Honor. It is claimed, in support of this theory, that from September, 1893, to June, 1894, Dr. Corum and family, consisting of his wife, son, and Miss Lena Mai, resided in Union City, and while there rented their residence from Offill, and that Offill occupied a room in the house and boarded in the family; that during this residence together, Offill became very much attached to the little girl, Lena Mai, and intimate with other members of the family. In June, 1894, the Corum family moved to Paris, their former home, and later were several times visited by Offill.

During his visit in October, 1894, Offill asked Dr. and Mrs. Corum to give the child to him, but this was refused. It is claimed that Offill thereupon promised and agreed to assume the duty of clothing and educating her, and paying all her expenses. But the extent of the fulfillment of this agreement was that Offill paid for music lessons for the child for about three months. He gave her a dress and a pair of shoes, and a little watch. We think, under the facts in this record, the said Lena Mai was in no legal or practical sense a dependent upon Offill. The assistance rendered her was in the nature of voluntary gifts, and not a support springing from any legal duty or moral obligations. One does not become a dependent, in the sense of these benevolent associations, by merely receiving occasional presents from the insured. *Alexander* v. *Parker*, 144 Ill., 355; 2 Am. & Eng. Enc. L. (2d Ed.), 944. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it, must, it would seem, rest upon some moral or legal or equitable grounds, and not upon the purely voluntary or charitable impulses or disposition of the member. *McCarthy* v. *Supreme Lodge*, 153 Mass., 314; 4 Am. & Eng. Enc. L. (2d Ed.), 944–970.

Bacon on Benefit Societies and Life Insurance, Section 261, says: "The same laws of that State (Missouri) expressly forbid corporations of this sort

from paying benefits to any but the members of family or dependents. The intent of the prohibition is clearly to shut out all persons who are not actual relatives or standing in place of relatives in some permanent way or in some actual dependence on the member." (60 Mich., 44.)

Again, the same author says: "We must logically exclude also those whose dependence upon the member is for favor, which may or may not take a pecuniary form, and which may be cast off at pleasure." (Sec. 261.)

The designation of a beneficiary not of the classes prescribed by the charter and laws of the order is void. Bacon on Benefit Societies, Section 245; 16 Am. & Eng. Enc. L. (Old Ed.), 48.

The proof, moreover, shows that at the time the second certificate was surrendered and a new certificate taken out, payable to Lena Mai Corum, the deceased was very much enfeebled in body and mind. He was at that time sixty-nine years of age, a widower, and childless. The weight of the evidence is that his mind was impaired to such an extent that he was incapable of transacting any business that required the exercise of judgment and discretion. This fact is established by a large number of witnesses who had known him intimately for years, and who had frequent opportunities for observing his conduct and conversation. Some of the professional witnesses characterized his mental infirmity as dementia from

age, or what is called in medical science, *senile dementia.*

We think, in view of all these facts, that the integrity of the second certificate in favor of Miss Offill was not in anywise impaired, and that, as the true beneficiary, she is entitled to the fund. Affirm the decree.

CLEMENT *v.* INSURANCE CO.

(*Jackson.* April 16, 1898.)

1. LIFE INSURANCE. *Incontestability.*

A stipulation that a life policy shall be incontestable after one year, if the premiums are paid, operates to preclude the insurer, after the year has elapsed and the premiums have been paid, from denying his liability to the beneficiary, or to a *bona fide* assignee, upon the ground that the policy was obtained by fraudulent misrepresentation, or upon any other ground going to the orginal validity of the policy. (*Post*, *pp.* 26–30.)

2. SAME. *Same.*

The stipulation that renders a life policy incontestable after one year, if the premiums are paid, so far limits another provision therein, or the general rule of the law, that fraud vitiates the policy, as to require the insurer to discover the fraud and seek relief within the year. (*Post*, *pp.* 29, 30.)

Cases cited: 43 Hun, 61; 11 Exch., 493; 118 N. Y., 237; 6 L. R. A., 731; 16 Am. St. Rep., 749; 111 Ind., 462; 60 Am. Rep., 707.

3. SAME. *Admissibility of evidence to impeach policy for fraud.*

Evidence to impeach a life policy for fraud in its procurement is not admissible to defeat the suit of the beneficiary, or of a *bona fide* assignee, when the policy, by its terms, has become incontestable; but such evidence is competent, in a suit upon an incontestable policy by an assignee, where it is insisted that the procurement and transfer of the policy were parts of a fraudulent scheme to evade the law forbidding wagering policies. (*Post*, *pp.* 30, 31.)

4. SAME. *Proof of payment of premiums.*

Under a life policy requiring payment of premiums to be made at the home office, or to an agent producing a receipt signed by an officer of the company and countersigned by himself, the payment is sufficiently proved by evidence of the admissions of one who was held out and recognized as agent of

the company, that he, as general agent of the company, received the premiums, and gave the required receipt. (*Post*, *pp. 31–33.*)

5. SAME. *Assignment of policy.*

The assignment of a life policy, if not forbidden by its terms, made in good faith by a beneficiary legally entitled to its benefit, is valid, although the assignee had no insurable interest in the life of the deceased; and if the policy had become incontestable, the assignee is entitled to the benefit of that quality. (*Post, p. 36.*)

6. SAME. *Consideration for assignment.*

It is a sufficient consideration for the *bona fide* assignment of an $8,000 life policy, that the assignee paid the assured twenty-five dollars cash, and assumed to pay all premiums on the $8,000 policy, and on a $2,000 policy taken out for the benefit of assured's wife. (*Post, pp. 33–35.*)

7. SAME. *Wagering policy.*

A life policy is void, as a wagering contract, by which one person, for his own benefit, insures the life of another in whom he has no insurable interest. (*Post, pp. 35, 36.*)

8. SAME. *Same. Example.*

The transaction is void, as a wagering contract, and is not protected by the clause rendering a life policy incontestable, where a third person, having no insurable interest in the life of the assured, conspires with him to evade the laws against wagering policies, and procures and pays for a policy to be issued in assured's name, and then assigned to himself. (*Post, pp. 36–39.*)

Cases cited: Insurance Co. *v.* Hamilton, 5 Sneed, 269; 25 L. R. A., 638, note.

FROM OBION.

Appeal from Chancery Court of Obion County. JNO. S. COOPER, Ch.

CALDWELL & LOWE for Clement.

TURLEY & WRIGHT and MOORE & WELLS for Insurance Co.

WILKES, J. This is an action upon a policy of insurancce for $8,000 upon the life of Mattie Lee Wright. The policy was issued on October 11, 1893, and was payable to the executors, administrators, and assigns of the insured. On October 19, 1893, it was assigned to R. H. Clement and W. B. Kerr upon consideration that they pay the premiums as they should accrue, as well as the premiums upon a policy of $2,000 issued simultaneously by the assured upon his life for the benefit of his wife, and the further consideration of $25 paid to the assured himself. The assured died December 27, 1894, or one year two months and sixteen days after the policy issued, he being about twenty-six years of age. After his death, W. B. Kerr assigned $2,228.10 of his part and interest in the policy to the Jerome Hill Cotton Company, to satisfy an attachment which had been levied upon it, and afterwards, but before this suit was instituted, assigned the remainder of his interest under the policy to his two sons, the complainants, W. A. and E. B. Kerr.

Upon the hearing of the cause in the Court below, upon a voluminous record and a vast volume of proof, the Chancellor was of opinion that complainants were not entitled to recover upon the policy, nor to any relief, and he dismissed the bill at

their cost, and they have appealed and assigned errors.

The learned Chancellor, in his decree, set out in full his finding of facts and conclusions of law thereon. We are satisfied, from an examination of the entire record as it is presented, that the Chancellor was, in the main, correct in finding the facts as follows:

When the policy was issued, the insured was not a fit and suitable subject for insurance, because of ill health and bodily infirmities of a serious character, which was well known to him, and concealed by him in making his application, and he procured the policy by fraudulent misrepresentations as to his physical condition. It also appears that prior to the delivery of the policy, and doubtless prior to the application, the said R. H. Clement and W. B. Kerr had agreed with the insured, that, for the consideration heretofore stated, he would transfer the policy for $8,000 to them, and the policy was procured in conformity to, and in pursuance of, such agreement, said Clement and Kerr paying the cash premium to the agent, but not until after the transfer was made and policy delivered to them. The terms of the transfer recite that Clement and Kerr were creditors of the insured, but such does not appear to be the fact from the record, except so far as that relation may be said to have arisen out of the agreement referred to, nor were they in any way related to him, nor did they have any insurable interest in the

life of the deceased, but had knowledge of his physical condition. The Chancellor was therefore of opinion that the transaction was a gambling or wagering contract upon the life of the insured, that to recognize or enforce it would be contrary to sound public policy, and that the subassignees or transferees of W. B. Kerr could stand upon no other or higher ground than he could.

Unquestionably the findings of the Chancellor are correct, and his conclusions correct, upon the record as presented to us, unless they are controlled and neutralized by the provisions of the policy in regard to the right of the company to contest its liability in case of death. The provision referred to is as follows:

"*Incontestability.*—After this policy shall have been in force one full year, if it shall become a claim by death, the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed."

The rights of the parties are thus made to turn upon the force, effect, and extent of this provision in the policy. It must be apparent from the outset that this provision was intended to have some material effect, and was not inserted as a matter of form. No more tempting provision to an applicant could be introduced into a policy of life insurance than this one, which guaranteed to the applicant that his policy should not be contested after the expiration of one year, provided the premiums were paid.

Premiums upon life policies are often paid at a great sacrifice, and one of the most disturbing and unsatisfactory features of the insurance contract is the fact that, after these sacrifices and payments have been made for a number of years, and the insured has died, so that his testimony and perhaps that of others has been rendered unavailable by the lapse of time and the occurrence of death, instead of receiving the promised reward, the beneficiary will be met with a contest and a lawsuit to determine whether the insurance ever had any validity or force. Hence it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others.

The provision in this case is very broad in its terms. There is only one condition upon which the validity of the policy can be questioned, after the lapse of a year, and that is the nonpayment of premiums. The meaning of the provision is that if the premiums are paid, the liability shall be absolute under the policy, and that no question shall be made of its original validity. No reasonable construction can be placed upon such provision other than that the company reserves to itself the right to ascertain all the facts and matters material to its risk, and the validity of their contract for one year, and if, within that time, it does not ascertain all the facts, and does not cancel and rescind the

contract, it may not do so afterward upon any ground then in existence.

The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period, the insurer must, if ever, test the validity of the policy.

It has been held that an agreement limiting the time within which an action may be brought upon a policy of insurance by the beneficiary, is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the Courts.

. It is said, however, that fraud appearing in the origin of the contract must, as in any other case, render it null and void from the beginning. It is true that fraud vitiates all agreements and undertakings based upon it, and they may be set aside at the instance of the party defrauded. So, in this case, fraud in obtaining the policy would vitiate it at the option and upon the motion of the party defrauded, but, under the provision in question, the party must within the year exercise his right to repudiate and rescind it. The effect of this agreement not to contest is to put the company in the attitude of being unable to set up any fraud or false swearing in obtaining the policy, or any other defense

to it, save the one excepted, so far as its original validity is concerned. Unless the language be thus construed, it is impracticable to put any reasonable interpretation on it. Unless it is the object and purpose of the provision to cut off all defenses arising out of the false statements of the applicant to obtain it, it is difficult to see what practical benefit the insured is to derive from it. . . .

It has been well said: "The effect of the provision is to prevent the insurer from interposing as a defense the falsity of the representations of the insured, which is a fraud. But it does not prevent abandonment, rescission, and cancellation of the contract for such fraud, provided the action for that purpose is brought within a year." It is virtually saying to the insured that "I will take one year in which to ascertain whether your representations are false or not, and whether you have been guilty of any fraud in obtaining the contract, and if within that period I cannot or do not detect such falsity and fraud, I will obligate myself to make no further inquiry into these matters, and to make no defense on account of them."

It has also been properly said: "Such a stipulation ought to be an incentive to the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy issued, while the matter is fresh, and thus it operates fairly between the parties. The witnesses are all alive, and the exact truth can, if ever,

be ascertained, and the stipulation prevents the insurer from laying by and receiving the premiums during the life of the insured, and after his death, when the good faith and the truth of his representations cannot be supported by his own oath and strengthened by his own efforts and superior knowledge, contesting the policy upon the ground that the insured's representations were false. It is true there is in the policy a stipulation that fraud shall vitiate it, but this is not inconsistent with the further requirement that the insurer must set up the fraud during the time limited." *Wright* v. *Mut. Ben. Asso.*, 43 Hun, 61; *Wood* v. *Dwarris*, 11 Exch., 493; *Wright* v. *Mut. Ben. Asso.*, 23 N. E. Rep., 186 (118 N. Y., 237; 6 L. R. A., 731; 16 Am. St. Rep., 749); *Kline* v. *Nat. Ben. Asso.*, 111 Ind., 462; 60 Am. Rep., 707.

Fraud is always required to be set up promptly when discovered, or it may be treated as waived, and the effect of this stipulation is that the insurer must exercise due diligence to discover such fraud within the year, and, if it fails to do so, it will treat it as waived, and no inquiry will be made or allowed into such matters. It clearly appears, from the record in this case, that the company in one year could have discovered all the facts now disclosed in the proof relating to this question.

Objection was made by the complainant to any testimony relating to the truth or falsity of the representations made or fraud practiced by the as-

sured or the transferees in obtaining this policy, but such objections were overruled, and much testimony pro and con was taken on this point, and this is now assigned as error. We are of opinion this would be error if the present suit was being prosecuted by the assured's representatives or any *bona fide* assignee of the assured. To give any effect to the stipulation, if the suit were in the interest of the original beneficiary or his *bona fide* assignee, the company must be estopped from inquiring into any matter involved in the original validity of the policy. But when the suit is brought by a transferee, and the Chancellor was of opinion that such transferee did not hold in good faith, and that the transfer was but a mere evasion of the rule against wagering policies, then the evidence was admissible on the question of fraud or good faith on the part of the transferee. . . .

It is said by the defendant company there is no sufficient proof that the premium due one year after the policy issued was ever paid to the company.

The bill alleges that the premium was paid promptly when due, and a receipt is filed for the same and made an exhibit to the bill; and again that all premiums have been promptly paid on the policy when due, and these payments were made under the agreement by the assignees, R. H. Clement and W. B. Kerr.

The contest is not that the premium was not paid, but that there is no evidence that such pay-

ment was made to the company or any authorized agent of the company. The answer neither admits nor denies the payment, but calls for strict proof of the same if deemed material. The alleged receipt, filed with the bill as an exhibit, is in the words and figures following:

"NEW YORK LIFE INSURANCE CO.,
"346 & 348 Broadway, New York.

"Received $164, being the annual premium due October 11, 1894, upon policy No. 565,543.

"JOHN A. MCCALL, *President.*

"Countersigned by
"WM. H. WOOD, *Cashier.*"

On the back of this receipt there is printed a "Notice to Policy Holders," and one clause of the notice is as follows: "All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but any premium may be paid to an agent producing a receipt therefor signed by the president, vice president, second vice president, actuary or secretary, and countersigned by such agent." A similar provision is found in the policy itself. Wm. H. Wood was not examined, but it was attempted to be shown that he stated that he was the general agent of the company at Memphis, where it had a branch office; that he was authorized to receive premiums and give receipts; and that he did receive the premium as stated, and executed the receipt. This evidence was objected to

on the ground that agency cannot be proven by the statements of the party assuming to act as such. The objection was overruled by the Chancellor, and to his ruling exception was taken. It is now assigned as error by the company that the Chancellor improperly admitted this testimony, and the same should have been excluded. We think there is ample evidence that Wood was held out and recognized as the general agent of the company, and that he had in his possession the receipt of the company signed by its president, Jno. A. McCall, and delivered this when the payment was made.

In regard to the point made that the assignees, R. H. Clements and W. B. Kerr, had no insurable interest in the life of the deceased, and the transaction as to them was invalid and void, it is necessary to repeat that the policy was not made payable to them when originally issued, but to the executors, administrators, and assigns of the insured. Within a few days thereafter, it was regularly assigned to said Clements and Kerr. The manner and form prescribed by the policy and the assignment or transfer was made known to and recognized by the company by receiving and retaining a copy of the transfer. A policy for $10,000 had been previously procured in another company, payable to Clements and Kerr, but in which the wife was to have a beneficial interest to the extent of $2,000; but this policy was not acceptable to Clements and Kerr, and they declined to receive it, and the ap-

plication was then made for the present policy, payable to the assured, with an agreement that he would transfer it to Clements and Kerr. The insured, before his death, executed a last will and testament, in which he recited that he was indebted to Clements and Kerr prior to October 1, 1893; that the policy had been issued to him and transferred to them on October 19, 1893, and the transfer accepted by the company November 14, 1893; and in his last will he directs that the proceeds of the policy be paid to them in the event of death.

As before stated, neither Clements nor Kerr were related in any way to the insured, nor were they creditors, nor did they give any consideration for the transfer, except the twenty-five dollars paid the insured, and undertaking to pay the premiums on the transferred policy, as well as the $2,000 policy issued at the same time with the policy in controversy upon the assured's life in favor of his wife, and they had knowledge of the assured's physical condition. If this transfer is not authorized by the policy or by any rule of law, or is opposed to any sound ground of public policy, we cannot see that such infirmity can be in any way cured by the provision not to contest. That provision relates to the issuance of the policy and the representations made to obtain it, and not to any subsequent transfer, disposition, or assignment of the policy. As to these matters, the stipulation has no reference or effect. It relates only to matters arising between the insurer

and the insured, and not to matters in which third persons are concerned. The only provision in the policy as to assignments is the following:

"Any assignment of this policy must be made in duplicate, and both copies must be sent to the home office, one of them to be retained by the company. The company has no responsibility for the validity of any assignment."

There is nothing in the policy as to who may be beneficiaries, nor as to whom assignments and transfers may be made, but it is clearly indicated that transfers and assignments may be made at the risk of the parties. We are therefore relegated to the general law of insurance to determine whether such transfer and assignment can be sustained. We think there can be no question but that the consideration for the transfer is sufficient as to amount and value, if it can be sustained on other grounds, and the only question is whether such transfer to one or more third persons having no insurable interest can be sustained under the rules of law and upon grounds of sound public policy. While the authorities are in hopeless conflict, the weight of authority is that one who takes out a policy upon the life of another, paying the premiums therefor himself, must have an insurable interest in the life of that other, or the policy will be a mere wager policy, upon which the party to whom it was issued cannot recover. See authorities collated in 3 Am. & Eng. Enc. L. (2d Ed.), 929.

But the weight of authority is that when the insured contracts directly with the insurer, paying the premiums himself, he may designate as beneficiary one who has no insurable interest in his life. *Ib.*, 959.

So, also, the weight of authority is that when a policy has once been issued to a beneficiary legally entitled, he may assign it to another who has no insurable interest, either by a transfer in his lifetime or by a last will and testament. *Ib.*, 1025.

But, while this is true, the transfer and assignment must be made in good faith, and not as a mere colorable evasion of the provision in regard to wagering contracts and in order to validate or legalize the same. *Ib.*, 1025, and notes; *Mutual Protection Ins. Co.* v. *Hamilton*, 5 Sneed, 269; *Nye* v. *Grand Lodge*, 9 Ind. App., 131; *Rittler* v. *Smith*, 70 Md., 261; *Fairchild* v. *N. E. Mut. Life Asso.*, 51 Vt., 613; *Bursinger* v. *Watertown Bank*, 67 Wis., 75; *Henlein* v. *Imperial Life Ins. Co.*, 25 L. R. A., 627, note; *Carpenter* v. *U. S. Life Ins. Co.*, 161 Pa. St., 9; *Fitzpatrick* v. *Hartford Life Ins. Co.*, 56 Conn., 116; *Olmstead* v. *Keyes*, 85 N. Y., 593; *Clark* v. *Allen*, 11 R. I., 439.

We think the facts in this case show that, while this policy was taken out by the assured, payable to his executors, etc., it was done under a pre-existing agreement with Clement and Kerr that they would pay the premiums and the other considera tions named, and have the benefit of the policy,

and the assignment to them was in furtherance of this agreement, and it was therefore a wagering policy. But it is said that if this be true, still the complainants can take under the will of the assured. It is doubtless true that anyone by will may bequeath the proceeds of a life policy, payable to himself or his executors or administrators, to whom he pleases, and the fact that the legatee has no insurable interest will not defeat his right to receive under the will. But the parties complainant do not sue or seek to recover in this case as legatees or under the will of the insured. On the contrary, they expressly state, when asked the question, in making proof of death, under what title they claim, that they claim under the transfer and assignment. The provision in the will appears clearly to be an afterthought, an act to strengthen, consummate, and support the transfer, and was in furtherance of the original fraudulent contrivance and agreement to vest an interest in complainants. While we think the party procuring a policy is entitled to rely upon a provision against contest, and may transfer this right to anyone, whether having an insurable interest or not, provided he takes in good faith, we can see no reason for extending the benefit to one who, by fraud commenced before and consummated after the policy issues (by means of an unauthorized and illegal transfer), seeks to reap the same benefit. This would be to allow an easy evasion of the rule against the validity of wagering contracts. *Henlein*

v. *Imperial Life Ins. Co.*, 25 L. R. A., 628, note.

It is argued, however, that the clause agreeing not to contest must have the effect to preclude any inquiry into the transfer and also the right of the transferee to take under the policy. We are of opinion, however, that the clause does not go to this extent and cannot have this effect. It is intended to cut off inquiry into the truth of the statements made by the assured in the application, and other matters going to the original validity of the policy, but not to any subsequent disposition of the policy, and the company expressly disclaims any responsibility for the validity of any assignment. There is nothing in this holding inconsistent with the ruling in the case of *Wright* v. *Mut. Ben. Asso. of America*, above referred to. See 6 L. R. A., 731; 16 Am. St. Rep., 749.

In that case, Houghton, the original beneficiary, was a creditor of Wright, and had, therefore, an insurable interest in his life, and the policy was not, therefore, a wagering policy. After the death he assigned and transferred his interest in the policy to the widow of the insured, and the suit was brought in her name. The Court held that she might re cover the entire amount of the policy and adjust the rights of Houghton out of the proceeds, and make such other payments as equity demanded out of the proceeds. But there was no evidence of any fraud, either in the original issuance of the policy or in

its subsequent transfer, and the whole matter appears to have been done in the utmost good faith and with no purpose of carrying out a wagering policy. While the Court is disposed to give to the assured, and parties taking under him in good faith, the full benefit and advantage of the noncontestable clause, by shutting off inquiries into the truth or falsity of the statements made in the application, and this because of the contract between the parties, it can see no reason why the like advantage and benefit should be extended to one who has no insurable interest in the assured, who does not take or claim in good faith, and whose entire connection with the matter is shown to have been for a speculative and fraudulent purpose, and no sound public policy can be subserved by so holding, but on the contrary, such holding would sanction wagering insurance contracts, to the great detriment of the public morals and public good. We are therefore of opinion the decree of the Chancellor is correct in its results, and it is affirmed, and the bill dismissed at complainant's cost.

RAILROAD *v.* BOGLE.

(*Jackson.* April 16, 1898.)

COMMON CARRIER. *Passenger's rights.*

A passenger, who, in a fancied emergency, mounts the engine to prevent his being left behind by the train, loses his right to that high degree of care that the law accords to passengers riding in the coaches, and can claim nothing more than protection from injury by the wilful, wanton, or intentional act of the carrier and its employes.

Cases cited: Railroad *v.* Wilson, 88 Tenn., 316; Railroad *v.* Meacham, 91 Tenn., 428; Railroad *v.* Hailey, 94 Tenn., 383.

FROM GIBSON.

Appeal in error from Circuit Court of Gibson County. JOHN R. BOND, J.

C. G. BOND and R. P. RAINES for Railroad.

W. S. COULTER and DEASON & RANKIN for Bogle.

BEARD, J. This action was brought for personal injuries sustained by defendant in error, and resulting, as is alleged, from the negligence of the plaintiff in error.

The facts, so far as is necessary to state them, are that Bogle shipped by this railroad a carload of

stock from Kenton, in this State, to East St. Louis. Attached to this train, of which this car formed a part, was a caboose for the use of the conductor, and of such parties who, as did the defendant in error, accompanied their stock, to look after and take care of them. At a station in Illinois the train took a siding, in order to open up the main line for the regular passenger train going south. Immediately upon its stoppage, Bogle left the caboose and went forward to the car containing his stock, to give them such attention as was necessary. While so engaged, the passenger train passed, and at once the stock train began to move backward to the main track, in order to resume its journey, and in a few minutes had straightened out on this line. Just as the engine cleared the switch, and was in the act of moving forward, Bogle reached its side, and believing that if he waited until the caboose reached the point where he then stood the train would have attained a speed which would make it dangerous for him to attempt to board it, and unwilling to be left, he ascended the engine. When he reached the cab, where the engineer stood at his post of duty, he explained to him why he had come upon the engine, and he says, in reply, the engineer told him to get off, as the train would be stopped at the water tank, just above that point, and he could then get in the caboose; that, regarding this as a positive command, he instantly obeyed; that in descending, to use his own words, he "didn't give the right

step, or something of that kind," and he fell to the ground, breaking one of the bones of his wrist. At the time of his descent the train was slightly in motion, and the defendant in error supposed he could safely dismount. The proof indicates that the train did go but a little distance beyond the point of the accident, when the engine was stopped at the water tank, and the caboose was located near the place where the injury occurred.

This is a sufficient statement of facts to raise the assignment of error mainly relied on for a reversal of this case. Upon these facts, there was a direct issue as to the measure of duty which the railroad owed the defendant in error. The latter insisted, that under the circumstances, he was warranted in getting on the engine, and while there, the road was bound to exercise the same degree of care for his safety that was due any other of its passengers; while the railroad's contention was, that Bogle having voluntarily abandoned the caboose prepared for passengers, and, without invitation, command, or direction, mounted to a perilous place on the engine, the passenger relation for the time being was broken or suspended, and the railroad was not responsible for an injury received by him as a consequence of this unwarranted act, unless the injury was the result of a wanton wrong on the part of its employes. This view of the law on this point was submitted by counsel of the railroad company in the form of a special request, which was as follows:

"If you find that plaintiff was on the train in charge of stock, and you find the company had a caboose where persons in charge of stock were to ride, and you find that when the train arrived at Mill Creek, Ill., it took the siding, and plaintiff got out of the caboose and went forward to look after or about his stock, and you find that he got on the engine without permission or direction of any one in charge of said train, then I charge you he was on the engine wrongfully, and no recovery can be had, except for wilful, wanton, or intentional injury by the defendant or its employes."

This was refused, and the reverse of this proposition was given in charge to the jury. In this the trial Judge committed error.

It is in evidence that a rule of the company forbade persons other than the engineer and fireman from riding on the engine, and while the record does not disclose that this rule was brought to the knowledge of Bogle, yet it does show he was an experienced traveler, and he was bound to know that a locomotive was unprepared and unfit for a passenger. It is at all times the most exposed and perilous portion of the train. In addition, the cab upon it is constructed for the use alone of those employes upon whom rests the grave responsibility of keeping a safe lookout, and at the same time directing the movement of the train. When, therefore, the defendant in error mounted the engine, although he did so in a case of fancied emergency, yet he

abandoned the place where the duty of utmost care was due him, and took a position where the only obligation of the railroad was to protect him from injury wantonly inflicted by its employes. For illustration of this rule, we refer to 2 Rap. & Mack R. R. Dig., p. 313, Sec. 21; pp. 328, 329, Sec. 60; p. 444, Sec. 351; p. 496, Sec. 459; *Byers* v. *Railroad Company*, 2 Am. Ry. Cases, 4; *Aufenberg* v. *Railroad Company*, 3 A. & E. R. R. C. (N. S.), 323; *Railroad Company* v. *Mickie*, 83 Ill., 427; Hutchinson on Carriers, Secs. 554, 590; *Railroad Company* v. *Wilson*, 4 Pickle, 316; *Railroad Company* v. *Meacham*, 7 Pickle, 428; *Railroad Company* v. *Hailey*, 10 Pickle, 383.

The judgment is reversed and the case is remanded for a new trial.

BANK *v.* LAYNE.

(*Jackson.* April 16, 1898.)

1. BILLS AND NOTES. *Parol evidence admissible to show true relation of parties.*

Parol evidence is admissible to show that the ostensible is not the true relation and order of liability among the parties to a note. (*Post, p. 49.*)

Cases cited and approved: Morrison *v.* Lookout Mountain Hotel Co., 92 Tenn., 6; Bank *v.* Jefferson, 92 Tenn., 537.

2. SAME. *Party signing as surety liable only as indorser.*

Although a party's name may appear as surety on a note, he may show by parol that the real contract among the parties was that his liability should be that of an indorser for his co-sureties, and the contract will be accordingly enforced. (*Post, pp. 49-53.*)

3. SAME. *Sureties not released, when.*

A debtor does not release sureties for his debt by dealing with a party as an indorser for them who is in fact such, although his name appears on the note as co-surety. (*Post, p. 53.*)

FROM OBION.

Appeal from Chancery Court of Obion County. JNO. S. COOPER, Ch.

WADDELL & WADDELL for Bank.

MOORE & WELLS and D. J. CALDWELL for Defendants.

Bank *v.* Layne.

BEARD, J. This bill was filed to recover a balance due on a note for $2,500, made by Max Layne as principal, and J. B. Layne and W. D. Reeves as his sureties, and indorsed by J. A. Reeves. The defendants, J. B. Layne and W. D. Reeves, having already paid to the holder two-thirds of this note, resisted recovery as to the balance, or the one-third remaining due, upon the ground that the bank had improperly released their co-defendant, J. A. Reeves, from his liability as co-surety with them, while the defendant, J. A. Reeves, defended on the ground that he was not liable at all, or, if so, that his liability was secondary and as surety of the sureties. Upon the hearing, the Chancellor rendered a decree, in which it was adjudged that J. A. Reeves was primarily bound for the amount due on this note as between him and W. D. Reeves and J. B. Layne, and that these two last named were liable after the said J. A. Reeves. W. D. and J. A. Reeves and J. B. Layne have appealed from this decree.

The facts out of which this controversy has grown, as disclosed by the record, are as follows: Upon the dissolution of a mercantile firm, of which the defendants, Max Layne and J. A. Reeves, were the members, the former became indebted to the latter in the sum of $2,500, for which amount he executed his note on February 26, 1895, to J. A. Reeves, with the defendants, W. D. Reeves and J. B. Layne, as sureties. The note was due twelve months after date, and bore interest from its date. The payee,

J. A. Reeves, continued the holder of this note until February 28, 1896, when he negotiated a loan upon it of $2,500 with the complainant, at the same time making the following indorsement upon it:

"FEBRUARY 28, 1896.

"*Commercial Bank of Union City, Tenn.:*

"If you will discount this note at $2,500 as a demand note, I will take it up at $2,500, and interest, from you, on demand, with cash or a satisfactory renewal. (Signed) J. A. REEVES."

It will be observed that the note was upon the verge of maturity at this time, and there is no doubt that it was the understanding of the bank and J. A. Reeves and Max Layne, and possibly of the other parties, that it was to be taken up by a renewal note. At any rate this was done; a new note, dated March 16, 1896, for the sum of $2,500, was executed. Instead, however, of J. A. Reeves being the payee of this note, it was made payable directly to the bank, and it was signed by Max Layne, J. B. Layne, W. D. Reeves, and J. A. Reeves, the latter affixing his name immediately beneath the names of the other signers, and in this form it was delivered to the bank, whose officers accepted it as a satisfaction of its interest in the original note, which was then delivered to J. A. Reeves. When this note matured, Max Layne was unable to meet it, and arrangements were made for a second renewal.

To this end, a note prepared by Mr. Thomason, the cashier of the bank, was by him sent to Max Layne, who, after affixing his name to it, transmitted it to W. D. Reeves, at St. Louis, Missouri, for his signature, and he, having signed it, then inclosed it to Mr. Thomason in a letter, in which he stated that Max Layne had informed him that "you [Thomason] would procure the signatures of Mr. John Layne and Al [J. A.] Reeves, in connection with mine, for him." On receipt of this letter, Thomason set about securing the names of these parties on the note, so as to complete the transaction. Mr. Thomason had at least two interviews with Mr. Layne, who seemed reluctant to sign, but finally did.

A few days thereafter, this note was presented by Thomason to Mr. J. A. Reeves, and he declined to place his name on it as one of the makers, but said he was willing to write it on the back, and thus sustain the same relation to the parties as he did by his indorsement of the original note. He further stated to the officers of the bank, that if they did not accept him as indorser with the understanding that his liability was secondary to that of J. B. Layne and W. D. Reeves, they might institute suit on the note they then held. This was finally conceded to him by the representatives of the bank, when he wrote his name on the back as indorser.

The liability of J. A. Reeves on the first of these series of notes—that is, the note of February

26, 1895—was clearly secondary to that of W. D. Reeves and J. B. Layne, and, by reason of this distinct understanding with the bank's officers, it is equally clear that his liability on the present one was also a secondary one. Nor is there any doubt that, as the bank knew that W. D. Reeves and J. B. Layne were sureties on the note of March 16, 1896, if it also knew that J. A. Reeeves was their co-surety, and permitted him to change his position on the note in controversy, so that he was placed behind them as surety for Max Layne, this act, by operation of law, would release them at least from one-third of this debt, and the Chancellor's decree, holding them liable (after they have paid two-thirds of it), even secondarily, was error. Brandt on Suretyship, Sec. 383.

It becomes, therefore, important to determine his relation to that note. As has been before stated, his name was on the face of the paper, and was signed immediately underneath that of these two sureties. That he was surety for Max Layne is clear, but was he also surety for the two original sureties of Max Layne, or was he co-surety with them? The answer to this question may be determined by looking at the facts surrounding the transaction, and to parol proof as to the agreement of the parties. *Morrison* v. *Lookout Mountain Hotel Co.*, 92 Tenn., 6; *Bank* v. *Jefferson*, *Ib.*, 537.

It has been already stated that W. D. Reeves and J. B. Layne were the sureties for the debtor

on the original note. So, when he discounted it at the bank, as between himself and the makers his liability was secondary.

The first renewal note was prepared by Thomason, the cashier in the bank, and by him was sent to Max Layne, who, having signed it, sent it to W. D. Reeves, who, after signing it, returned it to the bank, and Mr. Thomason then procured the signatures of J. B. Layne and J. A. Reeves to it.

W. D. Reeves and J. B. Layne, who were absolutely bound as sureties on the note of February 26, 1895, were then in no position to insist that J. A. Reeves should change his relation to this debt, and become jointly bound with them as sureties on the renewal. Nor does the record exhibit any reason why J. A. Reeves should be willing to so radical a change. The bank certainly derived no advantage from this change. Whether as indorser or as co-surety he would be liable to it on the default of the principal. Neither W. D. Reeves nor J. B. Layne claim to have had any communication with J. A. Reeves as to his signing the note as a co-surety with them. What he did was at the suggestion of the bank and after the note was in an apparently complete form. That he signed that note with the understanding on his part, as well as of the officers of the bank, that his relation to the debt and to the other parties already bound primarily, so far as he was concerned, should not be changed, we think is clear when the evidence is

carefully considered. J. A. Reeves says that when he signed the note he did not intend to extend his liability beyond that incurred by him on the original note—that of indorser, while the president of the bank says his understanding was that his liability, by his signing the note, was to be the same as on the original note, and the cashier says the same thing.

It is true J. A. Reeves says he knew Max Layne, instead of paying the original, would have to execute a renewal note, and that he "signed" it at the request and for the accommodation of Max Layne, and under the requirements of the bank, yet we think it certain that he means by this statement only that he was aware that it would be inconvenient for Max Layne to pay the original note at maturity, and that for his accommodation the witness was willing to sign or go upon a note, the proceeds of which would enable him to satisfy the demands of the bank as to the original note; and so far as the requirements of the bank were concerned, they were met when he placed his name on it so as to remain bound as on the original note. He distinctly states that he signed inadvertently at the foot of the note, but with no intention of being bound other or further than he was on the original note, and, as has already been seen, his signature was accepted there, by the officers of the bank, with the understanding that this was the limit of his liability. It is also true, Max Layne says, that, in December,

1895, he asked J. A. Reeves to become his surety on a note to the bank, to be used to raise money to pay off the note then nearing maturity, but we attach no importance to this statement, for in a popular sense, the latter would be equally the surety of the former, whether his name was on the back or front of the note.

Where the names of parties to a note are placed is to a degree immaterial, and when the relation of principal and surety is not expressed in the paper, it may be often implied from the ordinary legal relation of the parties in these various capacities. 2 Rand, Sec. 899.

That Max Layne was the principal, and that W. D. Reeves and J. B. Layne were, and intended to be, sureties for him was clearly expressed by them, in writing "surety" after their respective names. On the original note J. A. Reeves' liability was secondary to that of these two sureties; he never agreed with them, or anyone else, that he would assume any other position upon the new note, and no reason is suggested by the record why he should have done so. So, when his name is found on this new note underneath that of these two parties, who have already signed, we think it might be implied that he simply undertook as surety for the preceding parties. But when there is added to this implication the testimony of the officers of the bank, that they took the note of March 16, 1896, in that form, with the understanding that the liability of

J. A. Reeves was not affected by the change of position, and that of J. A. Reeves that his signature was placed on its face with the intention to be bound on the new note as he was on the original note, we think there is no difficulty in determining his liability to be secondary to that of the two other appellants.

Finding this as a fact, then it follows that W. D. Reeves and J. B. Layne have no occasion to complain, when the bank permitted him to place his name, as indorser, on the back of the note sued on, because the only effect of this act was to make his apparent correspond with his real relation to this debt.

It will be seen that we speak of the note of March 16 as a renewal note. It is immaterial whether it be treated as a strict renewal or not, as its execution was made necessary by Max Layne's inability to meet a note which had already matured, and was then held by the bank, and on which the liability of each party to it was then fixed.

The result is, the Chancellor was in error in decreeing that J. A. Reeves was primarily liable. A decree will be entered here adjudging that, as between W. D. Reeves, J. B. Layne, and J. A. Reeves, the two first named parties are first bound for the remainder of this note, and that J. A. Reeves is only liable after they are exhausted. The costs of the Court below will be left as they were adjudged by the Chancellor, and the costs of the

appeal will be paid by W. D. Reeves and J. B. Layne.

OPINION ON PETITION TO REHEAR.

BEARD, J. A petition for rehearing has been presented in this cause by W. D. Reeves and J. B. Layne. Before coming to the main ground upon which this petition is based, it is proper to mention a complaint made by petitioners that we failed to dispose of the assignment of error of J. A. Reeves, upon the action of the Chancellor in sustaining the demurrer of the petitioner to so much of his cross bill as sought a recovery against them for the interest due on the note of February 26, 1895. As this demurrer was rested on the ground that the subject of this cross bill was foreign to the controversy involved in the original suit, and was sustained by the Chancellor, it is difficult to conceive how petitioners could be in any way affected by our failure to dispose of this assignment of the adversary counsel. But whether petitioners were affected or not is immaterial. The omission was not the result of inadvertence, but deliberately made, for, on an examination of the transcript, we found that the case was not before us so that the action of the Chancellor on the demurrer could be reviewed; that while the cross complainant, at the time the demurrer to this cross bill was sustained, "excepted" to the action of the Chancellor in that regard, yet he did not embrace this matter in his appeal, but limited

this to the final decree. Desiring to confine our opinion to the real issue in the case, we purposely omitted all mention of an assignment of error that was without substance.

Again, it is insisted "an inaccurate statement" in the opinion that "upon the dissolution of the mercantile firm of which Max Layne and J. A. Reeves were the members, the former became indebted to the latter in the sum of $2,500, for which amount he executed his note on February 26, 1895, to J. A. Reeves, with the other defendants, W. D. Reeves and J. B. Layne, as sureties upon it," gave J. A. Reeves an equity at the beginning to which he was not entitled. It is difficult for us to conceive how the accuracy of our statement in this regard can be successfully challenged, in the face of this record. Max Layne, in his deposition, says: "Made said note in February, 1895. The note was given for $2,500, I agreeing to release J. A. Reeves from a co-partnership formed for the purpose of conducting a clothing . . . business, provided he would make me a loan of $2,500." This was recognized as the consideration of the note by counsel of petitioners, in their brief, in these words: "The loan of $2,500 made by J. A. Reeves to Max Layne, in February, 1895, was in consideration of Max Layne releasing him from a partnership contract." Thus, it appears that upon a dissolution of this firm, and as a condition for its dissolution, Max Layne executed and received this loan. As there was no pretense

that this note was a gratuity, or that it was otherwise than what it seemed to be, viz., a valid obligation upon the part of Max Layne and his sureties to pay the sum of $2,500 to J. A. Reeves, twelve months from its date, the writer of the opinion adopted the form of statement called in question as correctly indicating the relation of the respective parties to one another and to that obligation. The purpose was to show that this first in a series of notes leading up to the present controversy, evidenced a real debt due by Max Layne to J. A. Reeves, in which the other parties were sureties for their principal, and the statement of the manner in which the debt came about was rather by way of inducement, and was in no way essential to the main fact.

And it is true, as is insisted, that there was no moral or legal obligation resting on petitioners to renew this original note when it matured, but there was an obligation upon them to pay it, if their principal did not, and thus relieve the payee and indorser, J. A. Reeves, and the record, we think, leaves no room for doubt that it was to relieve them indirectly, and Max Layne directly, from the immediate discharge of this duty, and to enable the latter to get still further indulgence, that the dealing with the bank was resorted to, resulting in the execution of the new note of March 16, 1896.

It may be true, as stated, that the plan of getting the money from the bank was discussed, and,

perhaps, agreed upon, by Max Layne and J. A. Reeves, before it was mentioned to the other parties, but the fact remains that the loan thus contemplated was to be made for the purpose of lifting the strain of immediate payment of a binding obligation of Max Layne, J. B. Layne, and W. D. Reeves, held by J. A. Reeves, which was rapidly maturing, and while the arrangement resulted in placing $2,500 of that note in the pocket of the holder of the debt, it gave further indulgence to the makers, who, but for this arrangement, would have been obliged to take it up at maturity.

What motive J. A. Reeves could have in agreeing to an arrangement out of which he received simply the principal, lacking the interest, of his note, and assumed the position of guarantor and indorser upon it, save that of a friendly disposition to these parties, we cannot conceive, as the record does not disclose. It does appear, however, that all these makers, at the time the note of February, 1895, fell due, were solvent, and this fact furnishes an explanation of J. A. Reeves' willingness to make the indorsement he did when he turned it over to the bank, and goes far to repel any inference, that, while thus securing indulgence to them, he intended, or that any of these parties expected him, to change his relation to the debt or the parties to it, on the execution of the renewal note. Why should he do so? Max Layne, J. B. Layne, and W. D. Reeves were absolutely bound to him before the transfer of the original

note, and they stood between him and payment after its transfer. Their only alternatives at its maturity were to pay or renew, and Max Layne, the principal, for his own relief directly and that of his sureties indirectly, preferred the latter alternative—a renewal.

Now, under these circumstances, we can think of no motive to induce J. A. Reeves, intelligently and of design, to make the radical change in his relations to this continuing debt and these parties, as it is insisted he did, nor of any right on their part either to expect or demand such a change. It is against common experience and the ordinary and reasonable course of business transactions that this should have been done, and, therefore, his co-defendants, who insist that he did so, must be prepared to show the fact, and to this we do not think they make an approach, save in the single fact that he put his name on the face, rather than on its back. The force of this fact, however, is greatly weakened, if not entirely destroyed, when the record as a whole is examined. This was the view entertained by us, and the one we undertook to express in our original opinion. The case, by reason of the earnestness and ability of the several counsel engaged, as well as of its peculiar facts developing a singular controversy, was the subject of careful examination, followed by a most extensive consultation, before any conclusion was reached. Since the petition for rehearing was filed, fearing lest injustice might have

been done petitioners, the record has been re-examined, with a desire to find if an error had crept into our decree, and, if so, with a purpose to correct it. The result is that we are satisfied upon this phase of the controversy, and, without going again over the facts, that the conclusion announced by us was the one most justified by the case when taken in all its facts.

But it is urged that, without regard to former equities, and without regard to whether J. A. Reeves was an indorser or a security, these parties had the right to say to the bank: "We sign this note on the condition that J. A. Reeves is to sign as a co-surety for Max Layne." We agree that this is a sound proposition, and that if the record warranted it, and the bank had violated this condition thus imposed, it could not recover at all against these parties. But we do not think the testimony warrants it. It is true that J. B. Layne and W. D. Reeves now swear that they would not have signed this except save on that condition, but did they impose it on the bank?

The only communication that W. D. Reeves had with the bank was by the letter of June 19, 1896, made an exhibit to Mr. Thomason's deposition. In that letter he incloses the note in controversy, which he had received from Max Layne, and, having signed it, he forwarded it at his request. The following clause in the letter is the only one bearing on this point, viz., "and said [that is, Max Layne] that

you would procure the signatures of Mr. John Layne and Al Reeves, in connection with mine, for him." It will be observed that it is suggested that the note is forwarded to Mr. Thomason at the request of Max Layne, who desired that Mr. Thomason should act for him (Layne) in getting these "signatures." This falls far short of imposing the "condition" now urged, and especially a condition that J. A. (or Al) Reeves should be required to go on it as co-surety. It was his "signature" that was required, and, although it was to be "in connection" with the writer's, yet this "connection" was as literally answered when it was placed on the back, as on the face of the note. As to J. B. Layne, he does swear positively, on direct examination, that Mr. Thomason told him that J. A. Reeves had agreed "to sign" this note, and again, that he refused to sign it when it was first presented to him, because J. A. Reeves had not "signed it." On cross-examination, he confesses, however, that he did not know whether any name was on this note when presented to him to sign, and then, in answer to still another question, says he "thinks" he signed the note before J. A. Reeves. Contrast this with the undisputed fact, that, when presented to him, the note had already been signed by Max Layne and W. D. Reeves, and with his swearing in his direct examination, that he refused to sign it because J. A. Reeves' name was not on it, and it will be seen how weak and unsatisfactory his testi-

mony is. Other contradictions are found in his depositions that it is unnecessary to point out. In addition, Mr. Thomason, on this point, distinctly contradicts him.

Without occupying more time, we are satisfied on this record, first, that the note sued on is the last of a series of notes, the first of which represented a debt to J. A. Reeves, for which these petitioners were bound; second, that the note executed to the bank on March 16, 1896, was, in effect, a renewal, and that without either the demand of Max Layne and these petitioners, or their knowledge, and inadvertently upon the part of J. A. Reeves, he placed his name on the face of this note; third, that this was done without any purpose to change his relation to the debt or the parties, and that this was so understood by the officers of the bank; and, fourth, that the present note was not signed by J. B. Layne and W. D. Reeves upon condition that J. A. Reeves should attach his name as a co-surety with them.

The result is, the petition is dismissed.

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*RAILROAD *v.* TELEGRAPH CO.

(*Jackson.* April 16, 1898.)

1. RIGHT OF WAY. *For telegraph condemned over railroad's right of way.*

A condemnation of the right of way for a telegraph line over a railroad's right of way, is authorized by Acts 1885, Ch. 135 (Shannon's Code, §§ 1868–1871), conferring the right to take the property or easements of private corporations for public purposes and internal improvement. (*Post, pp. 64-66.*)

Code construed: §§ 1868–1871 (S.).

Act construed: Acts 1885, Ch. 135.

Act questioned as to its constitutionality: Acts 1885, Ch. 66.

2. MEASURE OF DAMAGES. *For use of railroad's right of way by telegraph company.*

Only nominal damages can be given to a railroad company for the use by a telegraph line of the space occupied by its posts and wires along the railroad right of way through an agricultural section of the country, when the use and occupation of the right of way for railroad purposes is not interfered with or incumbered in any way. (*Post, pp. 66-72.*)

Cases cited: 166 U. S., 248; 30 Ohio St., 604.

3. RAILROADS. *Estate or interest in condemned right of way defined.*

The estate or interest of a railroad company in its right of way acquired by condemnation is thus admirably defined by the court, in the opinion, to wit: "It does not acquire any estate in fee. It only acquires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance upon each side of its track, it has the right to occupy the way beyond its track, cuts, and fills, only to such distance and to such extent as to maintain its track and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, incumber, or use its right of way except as necessity and convenience may de-

mand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes, nor to public purposes, except so far as needful and helpful to the operation of the road itself." (*Post, pp. 67, 68.*)

FROM GIBSON.

Appeal from the Circuit Court of Gibson County. JOHN R. BOND, J.

DEASON & RANKIN, MCCORRY & BOND, and R. P. RAINES for Railroad.

HAYS & BIGGS and J. R. MCINTOSH for Telegraph Company.

FROM MADISON.

Appeal from the Circuit Court of Madison County. LEVI S. WOODS, J.

MCCORRY & BOND, CARUTHERS & MALLORY, and DEASON & RANKIN for Railroad.

HAYS & BIGGS and J. R. MCINTOSH for the Telegraph Company.

WILKES, J. These two cases involve in the main the same questions, and are heard together by

request of counsel. The actions were brought in the Circuit Courts of the respective counties of Gibson and Madison, by the telegraph company against the railroad company, to acquire rights of way for telegraph purposes along, upon, and over the right of way of the railroad company. The petitions in both cases were demurred to, and demurrer overruled, and they proceeded to hearing and disposition on the merits and for the assessment of damages, the Madison County case being heard, on appeal from the report of the jury of inquiry, before the Judge without a jury, and the Gibson County case by the Judge and a jury. In the Madison County case the trial Judge held that nothing but nominal damages could be had, and in the Gibson County case the learned Judge charged the jury that they could give, as damages, nothing except the value of the land occupied as post holes by the telegraph company.

The cases are before us on appeal by the railroad company, but the real party in interest is the Western Union Telegraph Co., a competing line, with which the railroad has a contract for an exclusive line over its right of way, and which has the right, under its contract, to use the name of the railroad company in any suit to resist the attempt of any competing line to construct any other line upon its right of way. This contract appears to be based upon a valuable consideration of services to be rendered.

The first question raised, is that the telegraph

company has no power to have condemned a right of way over the land already condemned for railroad purposes, in the absence of express legislative authority. 3 Elliott on Railroads, Sec. 964. It is conceded that such right is conferred by Ch. 66, Acts 1885, but it is insisted this Act is invalid for constitutional reasons, and that there is no other law conferring such right. The Constitution provides that "no bill shall become a law until it shall have been read and passed on three different days in each house, and shall have received, on its final passage in each house, the assent of a majority of all the members to which that house shall be entitled under this Constitution, and shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal."

There is no entry on the house journal showing that the Speaker of the House ever signed this bill. There is no other irregularity or defect alleged against its passage. The journals of each house show that it has passed on three separate readings on three different days in each, and the journal of the senate shows that it was signed by the Speaker of the Senate, and the fact noted on the senate journal, and then it was transmitted to the house for the signature of the Speaker of the House, but there is no entry upon the journal of the house that it was signed by the Speaker of the House. It was approved by the Governor upon the next day thereafter. It is said this defect vitiates the

whole Act, that the provision of the Constitution is mandatory, and unless complied with, the Act does not become a law or have any validity. This presents a question of grave difficulty and doubt, but if we concede this Act to be invalid, still, in our opinion, Chapter 135 of the Acts of 1885 (Shannon's Compilation, §§ 1868–1871), does not confer the right to condemn and take the property, privileges, rights, or easements, of private corporations for public purposes and internal improvements; and the construction of a telegraph line is a species of internal improvement, and expressly so regarded and treated in the other portions of the Act and as embraced by it. Shannon, §§ 1868–1871.

It is said this Act of 1885, Ch. 135, has reference to the remedy or mode of procedure to condemn property, and does not confer any right, and that the right was intended to be conferred by Section 66. While the Act does prescribe the manner of proceeding, it also clearly gives the right to take the privileges, rights, or easements of private corporations in the same manner and to the same extent as in case of the property of individuals. Shannon, §§ 1860–1871.

This being true, the next question that arises is as to the measure of damages, and the mode of ascertaining the same. In the Madison County case it was held, as before stated, that the railroad company was entitled to only nominal damages. In the Gibson County case the Court charged

the jury that the measure of damages was the value of the land taken (and occupied as post holes), but refused to charge that the proper measure of damages was the fair cash market value of said right of way or easement taken, estimated as if the railroad company was willing to sell and the telegraph company desired to buy that particular right of way or easement, and to give the fair cash market value of the right of way or easement taken, without deduction.

The contentions of the parties are thus shown to be that complainant insists that the damages are purely nominal, while the defendant insists, according to the request, that they are the fair cash market value of the right acquired, or easement secured, as if it were a matter of contract between the parties. In its petition, the telegraph company disclaims any right or purpose to obstruct, impede, or interfere with the railroad in its use of its right of way for railroad purposes, and proposes, whenever the railroad company desires to use any part of its right of way, occupied by the telegraph company, for additional side tracks, or other railroad use, to remove its poles and replace them at such other places on its right of way as may be mutually agreed on by the two companies. It proposes to plant its poles or posts thirty feet from the outside edge of the rail of the track of the railroad, and, upon the side of the track opposite that of the Western Union Telegraph Company's lines.

The interest or estate which a railroad company acquires in land over which its right of way extends, when they are acquired under condemnation proceedings, has been so often defined that it is familiar law. It does not acquire any estate in fee. It only requires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance upon each side of its track, it has no right to occupy the way beyond its track, cuts, and fills, or to such distance and to such extent as to maintain its track and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, incumber or use its right of way except as its necessities and convenience may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes nor to public purposes except so far as needful and helpful to the operation of the road itself. Jones on Easements, Sec. 383. Its right of way can therefore have no market value, because it cannot be placed upon the market, either at private sale or public outcry. A railroad company is entitled to have a right of way by process of condemnation, because it is a work of internal improvement—a quasi public use. But it has been held that land already taken by the exercise of eminent domain for a public use, and actually used for that purpose, may be taken by legislative authority for other public uses not inconsistent with or

destructive to the former use. Mills on Eminent Domain, Sec. 45, and cases there cited.

It is not insisted in this case that the use of the right of way, and construction of the telegraph line, will be any detriment or obstruction to the railroad, but, on the contrary, it is shown that it would be a benefit and a convenience. A telegraph line along a railroad line is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance. A railroad company may therefore construct a telegraph line along its right of way, or permit another to do so, but it acquires, and can confer, no exclusive right to do so. *Western Union Tel. Co.* v. *Baltimore R. R.*, 19 Fed. Rep., 660; *Western Union Tel. Co.* v. *American Union Tel. Co.*, 38 Am. Rep., 781; *Western Union Tel. Co.* v. *B. & O. S. W. R. R.*, 11 Fed. Rep., 1; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 3 Otto, 124; 3 Am. & Eng. Enc. L. (1st Ed.), pp. 885, 886.

Under this view of the estate and interest which railroad companies have in their right of way, it is difficult to see how the damages sustained by the road can be anything but nominal. We are not now considering the rights of the holders of contiguous lands, who own the fee in the lands over which the railroad has its rights of way. Such rights are in nowise involved in this case, and we make no intimation upon this feature of the matter. Neither is the question raised in these cases about the measure of damages when the railroad spans a large stream

by means of a bridge, and the telegraph company seeks to use the superstructure of the road as a support for its wires and fastenings. Such a condition of affairs is not presented by the record in this case, but we have only the ordinary case of the construction of a telegraph line over the railroad right of way, extending through an agricultural section of the country, when the telegraph company simply desires to plant its posts in the ground, and string its wires overhead along the right of way. Neither are we considering the possible contingency that may arise when it may become necessary or expedient for the railroad company to erect and maintain its own telegraph line for the proper conduct of its railroad business, and when the erection of such line by the railroad may conflict with any other line erected by a third person or company. This is simply a case where the railroad is not using the space occupied by the posts and wires, and when it cannot convey it to another for any purpose, in which case only nominal damages arise.

It is said with much earnestness, and with some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along the right of way, when a railroad company had expended thousands of dollars to clear and keep it free of obstructions, and yet pay nothing for the privilege. But this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not,

and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not, and there is no greater burden or expense because of the presence of a telegraph line.

The learned trial Judge in the Madison County case held: "The measure of damages to the defendant is the amount of decrease in the value of the use of the right of way for railroad purposes when it is jointly used for telegraph purposes." This rule was, no doubt, adopted from the rule laid down by the Supreme Court of the United States in the case of the *C. B. & Q. R. R. Co.* v. *City of Chicago*, 166 U. S., 248. That was a case where the city of Chicago desired to open a street across a portion of the railroad right of way in the city, and instituted condemnation proceedings in the Courts of Illinois. Jury awarded nominal damages of one hundred dollars. The Supreme Court of Illinois affirmed this verdict and judgment. The case was removed to the Supreme Court of the United States. It was attempted to be shown by the railroad company, that, in consequence of opening the street across its right of way, it would be put to an extra expense of erecting gates, maintaining flagmen, and planking the crossing; but this evidence, as well as evidence of the market or salable value of the land was excluded, and the Supreme Court of the United States held that it was not error to exclude such evidence of the salable value of the land, nor the estimated increase in maintaining the roadbed, flagmen, etc.

And the Court laid down the rule, as before stated, as applicable to railroads, though in the same proceedings and by the same jury, full damages were awarded to contiguous landowners for their lands, estimated on their value for all purposes. See, also, *Railway* v. *Railway*, 30 Ohio St., 604; Lewis on Eminent Domain, Secs. 489, 491, 492.

It is said that the statute (Shannon, § 1857) prescribed that the jury shall give the value of the land without deduction. But this has reference to the land of owners which may be used for all purposes. It does not refer to telegraph companies, but by § 1870 (Shannon) it is provided as to these that juries shall not be required to lay off the property, privileges, rights, or easements sought to be condemned, by metes and bounds, and it shall be discretionary with the jury of inquest whether they view the premises or not—a provision which is mandatory in cases of private property taken and condemned. The right of the railroad company being simply to occupy and use the right of way for railroad purposes, it follows that it can suffer only nominal damages when that use and occupation is not interfered with or incumbered in any way.

A question is raised in the Madison County case as to the right of the defendant to have a jury trial on appeal to the Circuit Court on the *quantum* of damages, but in the view we have taken, that the defendant was only entitled to nominal damages, that question is unimportant.

In the Gibson County case, damages of $12.50 were assessed upon the wrong basis, but as they are nominal in amount and not complained of, that case will not be reversed for the error, but both are affirmed with costs.

McNairy County *v.* McCoin.

(*Jackson.* May 7, 1898.)

COUNTY. *Entitled to indemnity for support of lunatic, when.*

An action by a county for indemnity out of the funds belonging to a lunatic may be maintained against the lunatic and her guardian, when, by the latter's neglect, the county has been compelled to provide for her as a pauper.

Code construed: §§ 2678, 2690, 2691 (S.); §§ 2101, 2113, 2114 (M. & V.); §§ 1594, 1606, 1607 (T. & S.).

FROM M'NAIRY.

Appeal from Chancery Court of McNairy County.

A. G. HAWKINS, Ch.

WOOD & BARNHILL for McNairy County.

J. C. HOUSTON for McCoin.

McALISTER, J. This bill was filed by McNairy County to recover the sum of $300 for the board and maintenance of a lunatic. The lunatic and her guardian are both made parties defendant.

It is alleged in the bill that some time prior to the year 1891, the said lunatic, Ellen McCoin, left the custody of her regular guardian, in Hardeman

County, and came to McNairy County; that she remained there for some time in a very destitute condition, without friends and without means of support; that her regular guardian continued to neglect her, and that it was absolutely necessary for the preservation of her life that necessary food, clothing, and medical attention be furnished her; that, under these circumstance, in June, 1891, she was admitted by the commissioners of the McNairy County Asylum for the Poor as an inmate.

The authorities of McNairy County, at that time, were not aware that the lunatic had a guardian in Hardeman County, or that he had any funds in his hands belonging to his ward. The county first became apprised of these facts in 1896, and thereupon made demand of said guardian for compensation for the expense incurred in the board and maintenance of said lunatic. The guardian declined to make compensation or to remove her, and she is still an inmate of said institution. It is charged that said guardian has in his hands the sum of five hundred and sixty dollars, funds belonging to said lunatic ward, and the bill prays that an order be made on him for the payment of said account out of said funds.

A demurrer was interposed on behalf of the guardian and his ward, assigning as grounds thereof: (1) That said lunatic ward had been admitted to said asylum without a contract, either express or implied, with the guardian or said ward; (2) because said

county asylum is a charitable institution, and said necessaries were furnished said lunatic gratuitously, and constitute no charge against her or her said guardian.

The Chancellor sustained the demurrer, and dismissed the bill. The county of McNairy appealed, and has assigned errors.

It is insisted, in support of the action of the Chancellor, that the county asylum of McNairy County, having been established under the general laws of the State, the Court will take judicial notice that it is purely a charitable or eleemosynary institution, with no authority of law for charging inmates for accommodations furnished them. It is said, moreover, there was no contract in this case, either express or implied, and the accommodations having been furnished voluntarily, the county cannot recover, and the principle is invoked that if services are rendered gratuitously compensation cannot afterwards be claimed.

It appears from the record that the McNairy County asylum was established in pursuance of the statute, which provides, viz.: "There shall be provided, at the expense of every county of the State, an asylum for the poor thereof, consisting of a parcel of land of such size, and of buildings thereon of such dimensions and construction, as the County Court may consider necessary and proper, a majority of the justices being present." Shannon's Code, § 2678.

"The commissioners shall examine all applicants

for admission into the asylum, and admit or reject any applicant, as they may think right," etc. Shannon's Code, § 2690.

"No person shall be admitted into the asylum who has not been an inhabitant of the county, by actual residence in it, for one whole year next preceding his application." § 2691.

In the management of the asylum, the commissioners shall have power, viz.: (1) To prescribe rules and regulations for the management of the farm and for the treatment of the inmates of the asylum and modify and change them at pleasure; (2) to prescribe the manner in which said inmates shall live, sleep, be clothed, and labor, if any of them are able to labor.

It will be observed that in the sections quoted, which are the only provisions of the statute relating to this subject, there is no express authority for the commissioners to demand compensation for the care and treatment of paupers, but the institution is established as a charity for the benefit of those who are incapable of taking care of themselves. It is insisted, however, that the lunatic ward and her guardian are liable for necessaries furnished one, who, at the time, was not a pauper, but had simply been neglected by her guardian.

Mr. Bishop, in his work on Contracts, Sec. 232, lays down the general rule on this subject, viz.: "In case of insanity, one who, whether by formal agreement with the insane person or not, in good

faith furnishes him with necessaries, being things required for his sustenance or comfort, and suitable to his means, condition, and habits of life, can, if he is not otherwise supplied, recover of him, on a promise which the law will imply, what they are reasonably worth. Were the law not so the insane might perish. Even expenditures and services for the protection of his estate may be included in this class."

But while stating this general principle, applicable to individuals who have furnished necessaries to the insane, the author lays down a wholly different rule, in cases where the benefit has been conferred by the county. "If a statute," says the author, "has imposed on a town or county the duty of rendering support to paupers, after it has furnished the support in a particular instance, thus discharging its own obligation, it can recover therefor nothing of any other body or person. The common illustration is where the pauper is found afterwards in possession of property, or leaves an estate, upon his death, and it is held, that, in the absence of fraud, there is no implied promise whereon to base an action for pay. Another form of reasoning, tending to the same result, is to regard the relief as an executed gift, which, therefore, cannot be reclaimed." Bishop on Contracts, Sec. 209.

We fail to perceive any sound reason for the distinction taken between the two cases. In the case of *Goodale* v. *Lawrence*, 88 N. Y., 513 (S. C., 42 Am. Rep., 259), it was insisted by counsel that

while an action may be maintained by a citizen for supplies furnished to a wife under such circumstances, no such action can be maintained by overseers of the poor. Said Justice Tracy: "No good reason can be assigned for such a distinction. If a citizen who volunteers to assist an [insane] wife abandoned by her husband, may maintain an action at common law upon the implied assumpsit of the husband, *a fortiori* may the poor authorities, who, in furnishing such assistance, are not volunteers, but act in the discharge of a duty imposed by law."

Again, in *Burney* v. *Keyes*, 7 N. H., 576, it was held that where a wife who lived separate from her husband had become poor and unable to maintain herself, and was assisted by the town, the town could maintain an action at common law to recover of the husband the amount of the expenditure on her account. Said Upham, Judge: "No reason can be assigned why an individual should be holden liable at common law for all necessary supplies furnished by a citizen to his suffering wife or child, arising from his neglect to make such provision, while the town, whose special duty it is to grant such relief, should be debarred from such remedy."

In the case first cited (*Goodale* v. *Lawrence*), it was held that where a husband refused to support his wife, he neglects a duty imposed by the common law, and incurs a common law liability to anyone who furnishes her a necessary support.

The duty imposed by the common law upon the

guardian to maintain and support his ward, is no less obligatory than that imposed upon the husband to support his wife, and if the guardian, with means of the ward at his disposal, breaches his duty and permits his ward to become a charge upon the county, it should be reimbursed for expenses incurred in supplying necessaries to said ward. It is true the county asylum, established under the laws of this State, is a charitable institution. It was designed for the care and maintenance of indigent paupers, and not for the benefit of those who have means sufficient to support themselves. If, therefore, it appears that the county, through the neglect of the guardian, has been compelled to provide for one who was not a pauper, it would seem but just that the county should be indemnified out of the funds belonging to the ward, and to this effect is the great weight of authority. *Goodale* v. *Lawrence*, 88 N. Y., 513; *Inhabitants of Morison* v. *Williams*, 6 Gray, 416; *Burnney* v. *Keyes*, 7 N. H., 576; *Alna* v. *Plummer*, 4 Greenl., 258; *City of Charleston* v. *Inhabitants of Groveland*, 15 Gray, 15; *Hanover* v. *Turner*, 14 Mass., 227 (S. C., 7 Am. Dec., 203); *Temple* v. *Stratton*, 128 Mass., 137; *Arlington* v. *Lyons*, 131 Mass., 328; *Wertz* v. *Blair Co.*, 66 Penn., 18; *Jasper Co.* v. *Osborn*, 59 Iowa, 208; *McCook Co.* v. *Kammose*, 7 S. D., 558; 58 Am. St. Rep., 854; 31 L. R. A., 461.

In the last case it appeared that there was a

statute of South Dakota imposing upon children the duty to support indigent parents, but no provision was made for enforcing same. Said the Court: "The duty, under the statute, rests upon the child, but, in consequence of his neglect, the statute humanely requires the county to provide such support. The county does not act officiously, but under the coercion of the law, and supplies the support which the son or daughter was under obligation (by statute) to supply. The duty to support being by law upon the child, he is liable upon the same principle that the father is liable at common law for necessary support furnished to a destitute minor child whom it is his duty to support. If, under such circumstances, the county, under the direction of the law, furnishes necessaries to the indigent and helpless father, we think, upon principle, it ought and may recover therefor against the children, whose duty it was to furnish the same, but who neglected and refused to do so. See, also, *Howard* v. *Whetstone*, 10 Ohio, 365; *Springfield* v. *Demott*, 13 Ohio, 104; *Ashland Co.* v. *Richland Co. Infirmary*, 7 Ohio St. Rep., 65 (S. C., 70 .Am. Dec., 49); 15 Ohio St. Rep., 409; 21 Ohio St. Rep., 374, 375; *Bangor* v. *Wiscasset*, 71 Me., 535; *Dakota* v. *Winneconne*, 55 Wis., 522; *Chester Co.* v. *Maloney*, 65 Pa., 144; 2 Kent's Com., 148.

The case of *Montgomery Co.* v. *Ristine*, 8 L. R. A., 461, decided by the Supreme Court of Indiana, and holding a contrary view, is out of line with the

current of authority, and was decided, moreover, by a divided Court.

The decree of the Chancellor sustaining the demurrer is reversed, and the cause will be remanded for an answer. The county of McNairy will pay the costs of the appeal.

BANK *v.* HALLER.

(*Jackson.* May 7, 1898.)

STATUTE OF LIMITATIONS. *Applicable to action for proceeds or value of property fraudulently conveyed.*

The statute of limitations applicable to an action by a creditor against the grantee of his debtor to recover the value or proceeds of property fraudulently conveyed, and not the specific property, is not three, but six, years.

Code construed: § 4470 (S.); § 3470 (M. & V.); § 2773 (T. & S.)

Cases cited: Solinsky *v.* Bank, 85 Tenn., 372; Reeves *v.* Dougherty, 7 Yer., 222; Knight *v.* Jordan, 6 Hum., 101; Marr *v.* Rucker, 1 Hum., 3458; Garrett *v.* Vaughn, 1 Bax., 113; Howell *v.* Thompson, 95 Tenn., 396.

FROM SHELBY.

Appeal from Chancery Court of Shelby County. STERLING PIERSON, Ch.

R. P. CAREY and CARUTHERS & EWING for Bank.

L. & E. LEHMAN, S. J. SHEPHERD, and H. C. WARRINER for Haller.

WILKES, J. This is a bill attacking a delivery of goods by Haller to Goodlet as fraudulent. The goods delivered, consisting of jewelry, were sold by

Goodlet before the bill was filed, and the prayer of the bill is that Goodlet be held liable for their proceeds or value. The Chancellor sustained the bill and gave judgment against Goodlet for the amount sued for, it being much less than the proceeds of the goods conveyed, and Goodlet has appealed to this Court and assigned errors.

Two questions are presented in this Court—first, whether the complainant's right of action is barred by the three years' statute of limitations, and, second, whether, as a matter of fact and law, the delivery and transfer made was fraudulent.

The first question was raised both by demurrer and by the answer. In the bill the allegations are made that the transfer to Goodlet was made prior to November 24, 1891, and this suit attacking it was brought July 7, 1896, or more than three years after the transfer was made, and the demurrer is to the effect that there is no sufficient averment that any fraudulent concealment was made to prevent the bringing of the suit within three years, and hence the action is barred by the statute of three years' adverse holding.

We need not stop to consider the concealment feature of the case, as it is neither sufficiently alleged, nor is it made out in the proof, but proceed at once to the investigation of the question whether the provisions of the statute (Shannon, § 4470) apply to this case. This section is as follows: "Actions for injuries to personal or real

property, actions for the detention or conversion of personal property [must be brought] within three years from the accruing of the cause of the action."

It is virtually conceded that if Goodlet had retained and held adverse possession of this specific property during three years, or the period set out, it could not be secured from him by the original owner or any creditor of his. Indeed this proposition is too well sustained by authority to be disputed. *Reeves* v. *Dougherty*, 7 Yer., 222; *Knight* v. *Jordan*, 6 Hum., 101; *Marr* v. *Rucker*, 1 Hum., 345; *Garrett* v. *Vaughn*, 1 Bax., 113; *Howell* v. *Thompson*, 11 Pickle, 396.

But it is insisted that this is not an action to recover or subject the specific property conveyed, for that was sold soon after it was transferred, but it is to recover the proceeds or value of the property sold. It is insisted that when property is converted or detained, the owner may sue to recover it back in kind, in which event he must bring his action in three years, or he may waive the tort and sue for the value as upon an implied contract, and in such case the action may be brought at any time in six years from its accrual.

In the case of *Solinsky* v. *Lincoln Savings Bank*, 1 Pickle, 372, it was held that when property fraudulently conveyed was sold by the fraudulent grantee, he could be held liable at the suit of a creditor for its proceeds or value. The question of the time

within which the suit may be brought was not considered by the Court.

It is true, the relations of the debtor and the creditor towards the fraudulent grantee are not the same, and, in many respects, are not at all analogous. For example, when there is a fraudulent conveyance, the grantor may not receive from the grantee either the specific property or its proceeds or value. But the creditor may do either. The grantor is repelled because of his fraud; the creditor is allowed to recover because of the same fraud which repels the grantor. It is only when the property is taken or withheld from the owner *in invitum*, that he can sue and recover either property or its value. In such cases, the theory upon which the owner is allowed to recover, is, first, that he may retake his own, and, second, that he may allow his adversary to keep it, and pay him its value on the idea that there is an implied promise to pay him what it is reasonably worth. It will be seen, therefore, that a creditor of a fraudulent grantor does not recover from the fraudulent grantee in the right of the grantor, but he stands upon his own independent right, superior to, and apart from, that of the grantor.

But, while all this is true, we think the theory of the law is, that notwithstanding the title to the property passes by the fraudulent conveyance, as between the grantor and grantee, so that the former loses his right to it because of the fraud, still, as

to the creditors of such grantor, the property continues in him, and it or its proceeds is liable to the creditor's demands. The grantee who thus takes property under a fraudulent conveyance, takes it with an implied obligation or agreement that the debts of creditors of the grantor may be satisfied out of it, and, in view and by virtue of this implied obligation and agreement, the creditor has six years in which to sue for the value of the property, just as the debtor would have but for his fraud, and as he does have in case of property illegally detained or converted from the debtor or owner.

We are of opinion that the statute of limitations will not avail the defendant in this case, as six years had not elapsed after the delivery of the property before suit was brought, and the demurrer was properly overruled. Upon the question of fact involved, as to whether the conveyance was fraudulent, it is not necessary to write.

TURBERVILLE *v.* FOWLER

AND

COONEY & CO. *v.* FOWLER.

(*Jackson.* May 7, 1898.)

1. DEED. *Invalid for want of registration.*

An unregistered deed is void as to the grantor's subsequent creditors, where he, without the knowledge of the grantee, executed and delivered it to the Register, with instructions not to record it until further notice, which was never given, and himself continued ostensible owner of the property, although the Register inadvertently noted the deed for registration. (*Post, pp. 89-94.*)

Acts construed: Acts 1841, Ch. ——.

Cases cited: Hickman *v.* Perrin, 6 Cold., 135; Swepson *v.* Bank, 9 Lea, 714–723; Woodward *v.* Bero, 16 Lea, 678; Flowers *v.* Wilkes, 1 Swan, 408; 37 Ark., 507; 52 Ark., 164; 17 N. H., 164; 108 Ill., 275.

2. REGISTRATION. *Noting for.*

While noting a deed for registration is made, by statute, the equivalent of registration, it will not have that effect where the noting is inadvertently done by the Register, contrary to instructions of the party having control of the deed. (*Post, pp. 93, 94.*

3. PRINCIPAL AND AGENT. *Grantor and grantee.*

A grantor who, without the grantee's knowledge, executes and delivers his deed to the Register, is not a special agent of the grantee in such sense as to render void the former's instruc-

tions to the Register not to register the deed until further notice.

FROM WEAKLEY.

Appeal from the Chancery Court of Weakley County. JOHN S. COOPER, Ch.

J. W. THOMAS and L. E. HOLLADAY for Turberville.

FRANK P. HALL for Fowler.

MCALISTER, J. These two causes, presenting the same questions, were consolidated in the Court below and heard together. The bills were filed by creditors of J. W. Fowler for the purpose of subjecting to the satisfaction of their claims a house and lot situated in the town of Gleason. This property is claimed by Mrs. M. A. Fowler, the mother of J. W. Fowler, under a conveyance from her son, the said J. W. Fowler, at a time anterior to the creation of the complainant's debts. The theory of the bill is, that said conveyance from J. W. Fowler to his mother, the said M. A. Fowler, was never recorded, and that the title remaining in J. W. Fowler, the property is still liable for his debts.

The record discloses that in January, 1893, the said J. W. Fowler, desiring to embark in the

mercantile business, borrowed of his mother, the said M. A. Fowler, the sum of three hundred dollars, for which he executed his promissory note. Accordingly, the said J. W. Fowler and one Meadows formed a partnership and engaged in the dry goods business in the town of Dresden. In January, 1894, this firm failed, and made a general assignment for the benefit of creditors. At that time the said J. W. Fowler caused a deed to the house and lot in question to be prepared, conveying the same to his mother, the said M. A. Fowler, for a recited consideration of $300. The firm, however, having succeeded in making a composition with their creditors, the deed in question was never signed or acknowledged or delivered. In 1895 the said J. W. Fowler disposed of his business in Dresden, removed to Martin, and engaged in the whisky business. About the first of March, 1896, he sold out this business for $1,200 in cash, and without settling with his creditors moved to St. Louis, Mo. Prior to his removal, however, and on May 9, 1896, he signed and acknowledged the deed conveying this house and lot to his mother, and deposited it with the Register of Weakley County, with instructions not to record it until further notice. The Register inadvertently, as he claims, noted the deed for registration, but in the absence of further instructions it was not recorded.

Complainants claim, under these facts, there was no legal registration of the instrument, and that the

property may be subjected by creditors of J. W. Fowler. The Chancellor so decreed, and ordered the property sold for the satisfaction of complainant's claim. Defendants appealed, and have assigned errors.

It is a disputed question of fact upon this record, whether J. W. Fowler gave the instructions to the Register in respect of the nonregistration of this instrument. J. W. Fowler strenuously denies that he gave such instructions. He states that when he delivered the deed to the Register, something was said about the payment of the registration fees, and he thereupon told him to record it and he would allow the fees in the settlement of a store account which the Register owed him. Fowler states the Register assented to this, and thereupon, in his presence, marked the deed filed. Fowler claims he had no knowledge the deed had not been recorded, until the present bills were filed.

On the other hand, the Register testifies as positively, that when the deed was left with him, Fowler directed him not to record it until further instructions. The witness admits that he noted the instrument for registration on same day it was filed, namely, May 9, 1896, at 6:30 P.M. The witness admits that he owed Fowler a small store account, and that it might have been understood at the time that the fees for recording this deed were to be allowed in this settlement, but that a settlement was afterwards made and these fees were not brought

into the account. The settlement was made some time after deed was filed.

It is insisted, on behalf of defendant, that the Register failed to record this deed through oversight, but this is denied by the Register, who testifies that he frequently saw this deed in looking over the unrecorded instruments. There is evidence tending to show that after this deed was left with the Register, J. W. Fowler still regarded this as his property, and exercised acts of ownership over it. It is shown, that, when he went to St. Louis, he appointed his cousin, W. O. Deason, as his agent, to rent it out and collect the rents. Some of the rents were sent to J. W. Fowler at St. Louis, but the larger part was turned over to Mrs. M. A. Fowler. It is further shown that J. W. Fowler authorized his agent to sell the property if he could procure a purchaser at a figure fixed. The agent testified that he supposed, during all this time, that J. W. Fowler was the owner of the property, and never heard that Mrs. M. A. Fowler had any interest in it. All these circumstances tend to strengthen the testimony of the Register in respect to the request of J. W. Fowler for the nonregistration of the instrument, and to show that J. W. Fowler intended to retain title to the property. It is insisted, however, that under the Act of 1841, "every deed or other instrument shall be considered as registered, and take effect at the time it is noted." In *Flowers* v. *Wilkes*, 1 Swan, 408, it was said

by this Court that the omission of the officer, whether intentional or not, to register all instruments without delay or in the order of their reception, as is directed by the third section, will not be allowed to defeat or prejudice the rights of parties. Again the Court said, viz.: "The party claiming under a deed or other instrument proved in proper form, and filed with the Register and noted by him in his book, in conformity with the Act of 1841, will stand in the same attitude, as well in respect to creditors of the vendor as purchasers from him, as if such deed or other instrument had been then actually spread upon the Register's books." See, also, *Swepson* v. *Bank*, 9 Lea, 714–723; *Woodward* v. *Bero*, 16 Lea, 678.

But in the present case, it is insisted by counsel for complainant that the deed in question was not legally registered, although noted for registration, for the reason that Fowler instructed the Register, at the time he delivered the deed, not to record it until further notice from him. It was held in the case of *Brown* v. *Fassett*, 37 Ark., 507, that an instrument which is left with the Recorder, with instructions not to record it until notified, will not be considered as filed for record until directions to record it are given. To the same effect is *Dedman* v. *Earl*, 52 Ark., 164; and in *Town* v. *Griffith*, 17 N. H., 164, it was said that this is so, although the Clerk may have noted thereon the time of receiving it. And in *Haworth* v. *Taylor*, 108 Ill., 725, and *Brigham* v. *Brown*, 44 Mich., 59, it was

held that if the deed be recorded before such instructions are given, the record is not notice. Again, if the instrument, having been filed, is withdrawn from the office before it is copied on the record books, its operation as constructive notice is suspended until it is returned. 20 Am. & Eng. Enc. L., p. 566; *Hickman* v. *Perrin*, 6 Cold., 135.

It is insisted herein that J. W. Fowler was a special agent, charged with the duty of delivering the deed to the Register for registration, and that he had no power to bind his mother, the vendee, by such instructions, conceding that he gave them to the Register. We do not find from this record there had ever been any delivery of this deed to Mrs. Fowler, and, hence, J. W. Fowler could not have been intrusted with it as a special agent for the purpose of having it recorded. It seems that the original unexecuted deed was at one time in the keeping of Mrs. Fowler, but this instrument was executed by J. W. Fowler, without any agreement with his mother, and, we believe, without her knowledge. The general rule is, that a delivery of a deed to the Register to be recorded is a sufficient delivery to the vendee; but where, as in this case, there has been no actual delivery to the vendor, and the Register is instructed by the vendee not to record it until further notice, there is no constructive delivery.

For these reasons we think the complainants, as creditors of J. W. Fowler, are entitled to subject this property to the payment of their debts, and the decree of the Chancellor is affirmed.

WHITE *v.* RAILROAD.

(*Jackson.* May 11, 1898.)

EMINENT DOMAIN. *Extent of railroad's right to condemn private property.*

Railroads are not entitled to condemn and take for any purpose, or on any account, private property lying outside the limits prescribed and allowed by statute for road purposes.

Acts construed: Acts 1887, Ch. 160; Acts 1875, Ch. 142; Acts 1871, Ch. 55.

Code construed: §§ 1844, 2413 (S.); §§ 1549, 1892 (M. & V.); § 1325 (T. & S.).

FROM SHELBY.

Appeal from Circuit Court of Shelby County. L. H. ESTES, Ch.

WM. M. RANDOLPH & SONS for White.

ADAMS & TRIMBLE for Railroad.

CALDWELL, J. This is a condemnation proceeding, wherein the Kansas City & Memphis Railway & Bridge Company obtained judgment in the Court below, condemning, for railway purposes, a piece of ground twenty-five feet square, the same being the rear portion of lot 10, in block 22, in that part of the city

of Memphis known as Fort Pickering. Francis White, the owner of the lot, has appealed and assigned numerous errors, only one of which requires consideration in this opinion.

Some years anterior to the commencement of the present proceeding, the railway and bridge company, which was an Arkansas corporation, constructed a bridge across the Mississippi river, and acquired, by condemnation and otherwise, a right of way for connecting and terminal purposes in the city of Memphis. This right of way adjoins the lot of ground here in question on one end. One track of its railway is laid in a twelve degrees curve around this end of the lot, and only twenty-five feet from it, so that the line of vision from certain opposite points on the curve must pass directly over the adjacent end of the lot. This end of the lot is elevated above the track, and upon it are situated trees and buildings to such an extent as to obstruct the view between these opposite points on the curve. To get rid of this obstruction and facilitate the operation of its trains upon this part of its track, the company has sought to condemn and reduce twenty-five feet of this end of the lot. One fatal objection to this prayer of the company and to the judgment of the trial Judge allowing it, is that the company has already, at this point, a right of way two hundred feet wide, that being the maximum width that railroad companies are, by the statute, allowed to condemn.

The petitioning company came into this State under the statutes which authorize and empower any railroad corporation, created by the laws of another State, to extend its line into this State a distance of five miles, to reach a terminal point or general or union depot, in or near any city, town or village in this State. Acts 1871, Ch. 55, Sec. 1; Code (M. & V.), § 1237; (Shannon), § 1488; Acts 1887, Ch. 160, Sec. 1; Code (Shannon), § 1874. Such a corporation may acquire its right of way in this State by purchase, gift or condemnation, in the same manner and to the same extent that a domestic railway corporation may acquire its right of way, and not otherwise. Acts 1887, Ch. 160, Sec. 2; Code (Shannon), § 1875. A domestic corporation, authorized by law to construct and operate a railroad, has power of eminent domain, and, under the prescribed forms, may have condemned and appropriated as an easement a right of way "not exceeding two hundred feet" in width, over any person's land through which its lines of road may be located. Code, § 1325; (M. & V.), § 1549; (Shannon), § 1844; Acts 1875, Ch. 142, Sec. 6; Code (M. & V.), § 1892; (Shannon), § 2413.

This statutory limitation is peremptory and conclusive. No company can, by condemnation, go beyond it. The right of condemnation is of statutory origin, and is limited to the provision of the statute. It results, therefore, that the company now before the Court had exhausted its right of condemnation

at the point in question before this proceeding was commenced, and that the Court below erred in permitting the additional appropriation over the objection of the owner.

Reverse and dismiss the petition.

Kling *v.* Packet Co.

KLING *v.* PACKET COMPANY.

(*Jackson.* May 11, 1898.)

1. CONSTITUTIONAL LAW. *Statute forbidding suit on pauper oath.*

A statute forbidding the bringing, upon the pauper oath, of "suits cognizable in the Courts of Admiralty of the United States," is not invalid as vicious class legislation.

Act construed: Acts 1897, Ch. 100.

Code construed: § 4928 (S.); § 3912 (M. & V.); § 3192 (T. & S.).

2. JURISDICTION. *Of United States Courts in Admiralty.*

The jurisdiction of Admiralty Courts of the United States extends to navigable waters above the ebb and flow of the tide, and the question whether such jurisdiction extends to a particular case is one of law and authority.

Cases cited: 12 How., 1059, 1068; 3 Wall., 184.

3. PAUPER OATH. *Not allowed.*

An action for injuries sustained by falling through the hatchway of a steamboat plying a navigable stream, is "cognizable in the Courts of Admiralty of the United States," within the provisions of Acts 1897, Ch. 100, and cannot, therefore, be prosecuted on the pauper oath in the State Courts.

Act construed: Acts 1897, Ch. 100.

FROM HARDIN.

Appeal from Circuit Court of Hardin County. E. D. PATTERSON, J.

E. W. Ross for Kling.

BROYLES & MCDOUGAL for Packet Company.

Kling *v.* Packet Co.

WILKES, J. This is an action for damages for personal injuries sustained on the steamer Sheffield, while navigating the Tennessee River through Hardin County. The plaintiff undertook to prosecute the suit upon the pauper's oath, and motion was made to dismiss on that account. The motion was sustained and suit dismissed, and plaintiff appealed and assigned errors.

By the Act of March 10, 1897, Ch. 100, page 248, the Legislature provided that suits cognizable in the Courts of Admiralty of the United States should be placed on the same footing as those for false imprisonment, malicious prosecution, etc., under § 4928, Shannon's compilation. It is said that there is nothing to show that Courts of Admiralty of the United States have cognizance of suits of this character. The facts stated are, that the plaintiff was injured on a steamboat by falling through a hatchway, and while the boat was plying the waters of the Tennessee River through Hardin County. As to whether Courts of Admiralty have jurisdiction in such cases, is a matter of law and of authority. In the earlier cases it was held that this jurisdiction existed only where the ocean tide ebbed and flowed, but since the case of *Gennessee Chief* v. *Fitzhugh*, 12 Howard, 1059, 1068, it has been held that it extends to all waters connecting with other States and counties, navigable by vessels used in commerce, and the jurisdiction attaches in such waters as are wholly within a State or only navigable

therein, and that a tort happening within the body of a county or above the tide does not affect the jurisdiction. 1 Am. & Eng. Enc. L. (2d Ed.), 650, 651, and cases cited. So it has been held that a suit for damages for an assault by a master upon a seaman while lying within the body of a county, is within the jurisdiction. 3 Wall. (U. S.), 184.

It is said that the Act is unconstitutional because it grants an immunity or exemption to defendant and persons in like condition, that it is class legislation, and is arbitrary, unnatural, and vicious.

The matter of requiring cost bonds is one within the province of the Legislature to regulate, and it is difficult to see why suits of the character mentioned may not be excepted from the exemption as well as those for false imprisonment, malicious prosecution, slanderous words, and divorce suits brought by males, under the statute, Shannon, § 4928.

The Act applies to all persons in the same situation, and is not so much the granting of an immunity as it is declining to grant a privilege to parties who may have such actions. The general provision of law is that all suitors shall give bond for costs, and it is within the province of the Legislature to say whether the plaintiff and others similarly situated shall be exempt from its requirements.

We are of opinion there is no error in the judgment of the Court below, and it is affirmed with costs.

TURCOTT *v.* RAILROAD.

(*Jackson.* May 11, 1898.)

1. FOREIGN CORPORATIONS. *Right to defense of statute of limitations.*

A foreign corporation is not "absent from," and does not "reside out of," the State, within the meaning of the statute suspending the running of statutes of limitations during nonresidence or absence from the State, where it has, for the period requisite for the running of the statute, continuously operated its business within the State, maintaining an office, with officers and agents subject, under our statutes, to service of process that binds the company. (*Post, pp. 103–109.*)

Code construed: § 4455 (S.); § 3458 (M. & V.); § 2762*b* (T. & S.).

Cases cited: Taylor *v.* McGill, 6 Lea, 294, 301; Telephone Co. *v.* Turner, 88 Tenn., 266; Young *v.* Iron Co., 85 Tenn., 189.

2. SAME. *Same.*

A foreign corporation that has, for the requisite period, continuously operated its business within the State, maintaining an office, with officers and agents subject, under our statute, to service of process that binds the corporation, is entitled to plead and rely upon the defense of the statute of limitations to the same extent as a domestic corporation, although it may have failed to comply with the requirements of Acts 1891, Ch. 122, as to registration of its charter and abstracts thereof. (*Post, pp. 110, 111.*)

Acts construed: Acts 1891, Ch. 122.

3. CORPORATION. *Is a person.*

A corporation is a person, within the purview of the statute that excludes absences from the State in computing the time for the running of statutes of limitations. (*Post, p. 105.*)

Code construed: §§ 62, 4455 (S.); §§ 48. 3458 (M. & V.); §§ 50, 2762*b*; (T. & S.).

Cases cited: Taylor *v.* McGill, 6 Lea, 294.

Turcott *v.* Railroad.

4. STATUTES. *Construction.*

A thing may be within the letter of a statute, yet not within its operation, if not so intended. (*Post, pp. 106.*)

Case cited: Taylor *v.* McGill, 6 Lea, 294.

FROM SHELBY.

Appeal from Circuit Court Shelby County. L. H. ESTES, J.

CARROLL, CHALMERS & MCKELLAR for Turcott.

FENTRESS & COOPER for Railroad.

WILKES, J. This is an action for damages for personal injuries inflicted in the shops of the defendant company at Vicksburg, Miss. The action was brought at Memphis, Tenn., May 25, 1895, about one and one-half years after the injury was suffered. Demurrers were filed, and the declaration was amended. To the declaration, as amended, pleas of not guilty, contributory negligence, and the Tennessee statute of limitation of one year for injuries to persons were filed. The latter plea states in detail that the defendant company had been operating its road through the State of Mississippi into and in the State of Tennessee for fourteen years; that it had an office and agents in the city of Memphis, and on these agents service at any time could have

been had, and that at no time had there been any impediment or hindrance to the bringing of this, or any other suit against it, or to the service of legal process upon it.

To this plea there was a replication, in substance that the defendant is a foreign corporation, organized and existing under the laws of Mississippi, and that, at the time of the accrual of this cause of action, it had no corporate or legal existence in Tennessee, because it had not complied with the requirements of the Acts of 1891, Ch. 122, as to the filing and registration of its charter, and not having so complied until after the bringing of this suit, it cannot plead the statute of limitations of one year in bar of the suit. There was a demurrer to this replication, and the demurrer was sustained.

The exact questions presented are whether foreign corporations can plead and rely upon this Tennessee statute of limitation when they have offices and agents in the State subject to continuous service of process, and whether the failure to file and register its charter will deprive it of that right, if otherwise it would be held to have it.

Under the statutes of Tennessee (Shannon, § 4469), it is provided, among other things, that actions for injuries to the person must be commenced within one year after the cause of action accrues, or be barred.

Section 4455 (Shannon) provides: "If, at any time, any cause of action shall accrue against any person who shall be out of this State, the action

may be commenced within the time limited therefor, after such person shall have come into the State; and after any cause of action shall have accrued, if the person against whom it has accrued shall be absent from, or reside out of the State, the time of his absence or residence out of the State shall not be taken as any part of the time limited for the commencement of the action."

The word "person" includes a "corporation." Shannon, § 62. The exception made in this statute does not apply to a natural person unless his absence from the State is such as to prevent service of process. *Taylor* v. *McGill*, 6 Lea, 294, 301.

The statutes relating to service of process upon corporations are as follows:

"Service of process on the president, or other head of a corporation, or, in his absence, on the cashier, treasurer or secretary, or, in the absence of such officers, on any director of such corporation, shall be sufficient." Shannon, § 4539.

"If neither the president, cashier, or secretary resides within the State, service on the chief agent of the corporation residing at the time in the county where the action is brought, shall be deemed sufficient." Shannon, § 4540.

No question is made but that there was ample opportunity to obtain service of process at any time on the defendant through its officers and agents, nor that foreign corporations are liable to service under these sections. *Telephone Co.* v. *Turner*, 4 Pickle, 266.

But the contention is, that a foreign corporation is out of the State, and resides out of the State, and so falls within the exception before stated, and that, while process may be made upon it, still it is optional with a party aggrieved whether and when he will commence his suit, and the bar of the statute cannot be set up if the suit is not brought within one year, and that it does not come within the State in legal contemplation, till it files and registers its charter. It appears that there is some conflict of decision upon the first question. The reason of the rule of law is, that no person who is not and has not been subject to service of process within the year, shall avail himself of its exemption. *Taylor* v. *McGill*, 6 Lea, 294. Unquestionably the residence of a corporation is the State of its creation. *Young* v. *South Tredegar Iron Co.*, 1 Pickle, 189. And if we should give the statute a strict, literal construction, it might be held that a foreign corporation was not entitled to the benefit of the limitation. Still the Courts will not permit the literalism of the statute to thwart its obvious purpose, intent, and meaning. A thing may be within the letter of the statute, yet not within its operation if not so intended. *Taylor* v. *McGill*, 6 Lea, 294.

We think the true rule is laid down in Murfree on Foreign Corporations, and that the rule as thus laid down is based on sound reason and principle. In speaking of such foreign corporation pleading the

statute of limitations, it is said (Sec. 248): "As to the question whether a foreign corporation, when sued, can plead the bar of the statute in defense, it may be said that the great weight of authority is in favor of the conclusion suggested above; that the true test of the running of the statute is the liability of the party invoking its bar, to the service of process during the whole of the period prescribed; that if the operations of the company within the jurisdiction were such as to render it liable to suit, then it may plead the statute. The principles upon which this doctrine rests have nowhere been more effectively expressed than in the decision of the Illinois Appellate Court, in *Pennsylvania Co.* v. *Sloan*. Said Pleasants, J., who delivered the opinion of the Court, after referring to a number of cases holding that a corporation must be considered an inhabitant of the State by which it is created: 'We should have no hesitation in approving these applications of the doctrine if there were no other element in the cases bearing on the question than the origin and nature of the corporation. For it is true that a positive law can never, of its own force, and ordinarily does not otherwise, operate beyond the territorial limits of the power by which it is enacted; and, hence, unless it is otherwise enabled, a corporation must indeed dwell in the place of its creation, and cannot migrate into another sovereignty. But the law of one State may have operation for certain purposes in another by the comity

or permission of the latter, and we see no insuperable difficulty in the way of such migration, provided the former does not positively forbid and the latter does positively consent. It is conceded that with such consent, they lawfully may, as they often actually do, remove their officers, agents, offices and effects into another sovereignty, and there exercise their functions and franchises. In such a case, where is the corporation? If it be said that it still dwells in the place of it creation, and is acting elsewhere only by agents, the answer is no more by agents elsewhere than in the place of its creation. It can do nothing anywhere, nor manifest its presence or being at all, except through its agents, its property, or its operation. Where these are, then, it seems most accordant with substantial fact and reason to say, there is the corporation. Where these are not, we know of no means by which process can be served upon it; and if there be none, that fact would seem to be conclusive upon the question of residence for the time being, at least for purposes of judicial jurisdiction.'"

In Montana it was held that the fact that a foreign company had subjected itself to a penalty by failing to file its charter or act of incorporation as required by the statute, though such failure did not disqualify it from being sued, did not thereby lose the right to plead the statute. See *King* v. *N. M. & E. Co.*, 4 Am. & Eng. Corp. Cas., 14.

In support of the text, the author cites the fol-

lowing authorities: *Bank of U. S.* v. *McKenzie*, 2 Brook (U. S.), 393. Compare *Clark* v. *Bank of Miss.*, 10 Ark., 516 (52 Am. Dec., 248); *Holy Trinity Church* v. *U. S.*, 143 U. S., 457; *Huse* v. *Central R. R.*, 66 Ala., 472; *Lawrence* v. *Ballou*, 50 Cal., 258; *Express Co.* v. *Ware*, 20 Wall., 543; *Hall* v. *Vermont R. Co.*, 28 Vt., 401; *Penn. Co.* v. *Sloan*, 1 Ill. App., 364; *King* v. *Nat. M. & E. Co.*, 4 Mont., 1; 4 A. & E. Corp. Cases, 14; *Con. Mut. Life Ins. Co.* v. *Duerson*, 28 Gratt., 630; *Wall* v. *Chicago R. R. Co.*, 69 Iowa, 498; *McCabe* v. *Illinois Central Railroad Co.*, 4 McCrary, 492 (13 Fed. Rep., 827). See, also, *Winney* v. *Sandwich Mfg. Co.* (Iowa), 50 N. W. Rep., 565; *Koons* v. *Chicago R. R. Co.*, 23 Iowa, 493. Compare *Abell* v. *Penn. Mut. Ins. Co.*, 18 W. Va., 400; *North Mo. R. R. Co.* v. *Akers*, 4 Kan., 453; *Waterman* v. *Sprague Mfg. Co.*, 55 Conn., 554; 13 Atl. Rep., 240; *N. Y. Cent. R. R.* v. *Estell*, 147 U. S., 608.

We are aware that New York, Nevada, Kansas, and possibly other States, do not follow this rule. It is said that such holding raises a discrimination against individuals and in favor of corporations. The argument is, that individuals cannot claim the exemption when they are out of the State or are nonresidents, and it would be inequitable to allow corporations out of the State or nonresidents to claim it. But this apparent difference arises out of the fact that individuals out of the State or residing out

of it, cannot be reached by process against a resident agent, while a corporation can; so that in the one case suit cannot be brought and in the other it may. Absence from the State, and residence out of the State, in the sense of the statute, means such absence and such nonresidence as renders it impracticable at all times to obtain service of process, so that, while a corporation's technical legal residence may be where it was created, its residence and status, for purposes of suit, will be where it can, through its officers and agents, be reached with process. While a corporation may reside beyond the State, and be out of the State, still it may, through its officers and agents, subject itself to the jurisdiction of the Courts of the State. It may sue and be sued in a jurisdiction foreign to its technical residence.

Nor do we think the failure to comply with the Act of 1891, Chapter 122, will preclude this foreign corporation from setting up the statute.

It would not be a proper construction of that statute to hold that a corporation actually doing business in the State without complying with the statute, could not be sued for a tort committed, and, having been impleaded upon the ground of tort, it cannot be that the failure to comply with that statute must preclude it from making any defense, for it logically follows that if it cannot make this defense because of its failure, it can make no other.

The scope and purpose of that Act was to require corporations to file and register their charters,

in order that they might do business, own or acquire property, and be enabled to sue, but it was never intended to exempt them from suit if they disregarded the statute, nor to estop them from making defense if so sued, otherwise their property might be taken from them, and they estopped to defend. This company was in the State owning property and doing business before the Act was passed, and while this did not exempt it from a compliance with the Act, in order that it might have all the rights of a domestic corporation, at the same time it was not the purpose nor the proper construction of that Act, that its property should be taken from it, or its right to defend actions brought against it should be cut off by its failure to comply with it. Let the judgment be affirmed with costs.

HUFF *v.* GLENN.

(*Jackson.* May 11, 1898.)

MORTGAGES AND DEEDS OF TRUST. *Of separate estate of feme covert void, when.*

A joint mortgage of the wife's separate estate, acknowledged by the husband and wife before an officer having no authority to take acknowledgments of deeds, is void. While a married woman's deed or mortgage of her separate estate may, under the statutes, be valid in certain excepted cases without joinder of her husband, it cannot be sustained in any case without her privy examination, taken in due form before a duly authorized officer.

Code construed: §§ 4242–4246 (S.); §§ 3346–3350 (M. & V.); §§ 2486*a*–2486*c*.

Act construed: Acts 1869–70, Ch. 99.

Case cited and distinguished: Vick *v.* Gower, 92 Tenn., 391.

FROM GIBSON.

Appeal from Chancery Court of Gibson County. JOHN S. COOPER, Ch.

R. P. RAINES and T. J. HAYS for Huff.

WALKER & BIGGS for Glenn.

BEARD, J. The bill in this case was filed to enforce a mortgage of rents to accrue on certain real estate of Mrs. Glenn, which she held as a sep-

arate estate. This mortgage was made by the husband and wife to secure a note of five hundred dollars, executed by the husband of Mrs. Glenn some months before the date of the mortgage. The Chancellor dismissed the bill upon several grounds, among them being that the mortgage was not authenticated so as to bind Mrs. Glenn.

The instrument in question was acknowledged by Mr. and Mrs. Glenn, who seem, at the time, to have been domiciled in Texas, before a Clerk of one of the County Courts of that State. His certificate of acknowledgment is fatally defective so far as Mrs. Glenn is concerned. We understand this to be conceded, if this instrument is to be treated as the ordinary deed or mortgage of a husband and wife conveying a wife's interest in real estate. But it is insisted that this is a mortgage of the wife's separate estate, and that under Ch. 99 of the Acts of 1869–70, carried into the (Shannon's) Code at §§ 4242, 4243, 4244, 4246, it is good without any privy examination of the wife. This contention is unsound. The Act in question, so far as it is necessary to the settlement of the present question, is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same powers of disposition,

by will, deed, or otherwise, as are possessed by *femes solè* or unmarried women.

"SEC. 2. *Be it further enacted*, That the powers of said married women to sell, convey, devise, charge, or mortgage their real estate shall not depend upon the concurrence of the husband, or his consent thereto, provided her privy examination to any deed, mortgage, or other conveyance shall take place before a Chancellor or Circuit Judge of this State, or Clerk of the County Court.

"SEC. 3. *Be it further enacted*, That *femes covert* or married women owning a separate estate settled upon them and for their separate use, shall have and possess the same power of disposition, by deed, will, or otherwise, as are given under the first and second sections of this Act, provided the power of disposition is not expressly withheld in the deed or will under which they hold the property. . . .

"SEC. 6. *Be it further enacted*, That the provisions of this Act, except the provisions of the third section of this Act, shall apply to and embrace only such *femes covert*, or married women, as have abandoned their husbands, or who may refuse to live with or cohabit with their husbands, or whose husbands may be *non compos mentis*, insane, or of unsound mind; and also to such married women, or *femes covert*, whose husbands may fail or refuse to cohabit with or have abandoned such married women or *femes covert*," etc.

There is no pretense in this record that Mrs.

Glenn, at the time of the execution of this mortgage, belonged to either of those classes of married women named in the sixth section of the Act—that she had either abandoned or been abandoned by her husband, or that she had refused to cohabit with him, or he with her, or that he was in any condition of mental unsoundness, as described therein.

The result is, that complainant cannot, to support his conveyance, invoke the provisions of sections one and two, but must rely alone upon the terms of section three of the Act. This section gives to a married woman owning a separate estate, where the power of disposition is not expressly withheld in the instrument creating it, "the same power of disposition that is given by the first and second sections of this Act." Upon recurring to these sections, it will be seen that the powers of disposition of the *femes covert* therein provided for are not dependent upon the concurrence or consent of the husband, provided a privy examination is had before a Chancellor or Circuit Judge of the State or a Clerk of the County Court.

In other words, under these sections, if a married woman who falls within any of the classes designated in section six of the Act, undertake to make a conveyance, then, to effectuate it, her acknowledgment must be taken in the form and before the officers designated. And this is equally true with regard to married women whose cases are covered by the third section; to make their conveyance, under the terms

of this Act, operative, they must be privily examined by some one of the public officers named in the second section.

In the present case no effort was made to conform to the provisions of this statute, but husband and wife joined in the conveyance and the acknowledgment, and this was taken by an officer of another State. But it is insisted that this acknowledgment is good, on the authority of *Vick* v. *Gower*, 92 Tenn., 391. An examination of that case shows that the instrument there in question was a deed made by a married woman, conveying her separate real estate to her husband. Subsequently she obtained a divorce from this husband, and, having married again, she filed a bill in the Chancery Court to set aside that deed. She alleged three grounds for relief: (1) That there was no consideration for the conveyance; (2) that it was obtained by moral coercion; and (3) that she had no power to make the deed to her husband, even if it conveyed a separate estate.

In the opinion, this Court, in a few words, disposes of the first two grounds of objection, and, at length, of the third and remaining one. In meeting this objection, which was rested on the common law disability of the wife, the Court referred to the Act in question as, by its terms, empowering a married woman to convey her separate estate, where the power of disposition was not expressly withheld from her as an unmarried woman, and held that the con-

veyance in question was within the provisions of the Act. It is thus seen that the only question in that case was as to the power of the married woman to make the conveyance in controversy, and not, as in the present case, as to the legal and effectual mode of exercising such power. In fact, the opinion does not indicate what officer took the acknowledgment of the *feme covert* to her deed, and it must, therefore, be assumed, and is no doubt true, that it was some one of those authorized by the Act. It is apparent that that case gives no support to the contention of complainant in this cause.

The decree of the Chancellor is affirmed as to Mrs. Glenn and the mortgage in question, but it is modified so as to give complainant a personal decree against J. G. Glenn for balance due on the note.

HERMAN BROS. *v.* KATZ BROS.

(*Jackson.* May 11, 1898.)

1. FIRE INSURANCE. *Change, by levies upon insured property, does not avoid policy.*

The change of title and possession wrought by levy of attachment upon insured property, and possession of the officer thereunder, followed by subordinate constructive levy of an execution thereon and by appointment of receiver under the attachment proceedings, who never obtained possession, is not, in the absence of proof or inference that the hazard was thereby increased, such change as will avoid the policy under a provision therein that it "shall be void if any change, other than by the death of the assured, take place in the interest, title, or possession of the subject-matter of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the assured, or otherwise." (*Post, pp. 119–129.*)

Cases cited: Pennebaker *v.* Tomlinson, 1 Tenn. Ch., 603; Brown *v.* Allen, 3 Head, 429; Bradley *v.* Kesee, 5 Cold., 226; Connell *v.* Scott, 5 Bax., 598; Green *v.* Shaver, 3 Hum., 138; Snell *v.* Allen, 1 Swan, 208; McKnight *v.* Hughes, 4 Lea, 525; Puckett *v.* Richardson, 6 Lea, 58; Montgomery *v.* Realhafer, 85 Tenn., 668; Overton *v.* Perkins, 10 Yer., 329; Tyler *v.* Dunton, 1 Tenn. Ch., 361; Evans *v.* Barnes, 2 Swan, 293; Malone *v.* Abbott, 3 Hum., 533.

2. SAME. *Clause as to changes construed.*

In the clause of a fire policy providing that it "shall be void if any change, other than by the death of the assured, take place in the interest, title, or possession of the subject-matter of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the assured, or otherwise," the parenthetical clause, to wit, "except change of occupants without increase of hazard," operates to limit not only the preceding words, "possession and interest," but the word "title" also, and the exception

applies to insurance of personalty as well as realty. (*Post, pp. 121–125.*)

Cases cited: 136 N. Y., 375 (S. C., 32 Am. St. Rep., 752); 144 N. Y., 195; 149 N. Y., 382.

FROM DYER.

Appeal from Chancery Court of Dyer County. JNO. S. COOPER, Ch.

JOHN RUHM & SON, DRAPER & RICE, and NATHAN COHN for Complainants.

M. M. MARSHALL, STOKES & STOKES, DEASON & RANKIN, and HARWOOD & TYREE for Defendants.

McALISTER, J. Complainants, who are creditors of defendants, Katz Bros., filed these bills in the Chancery Court of Dyer County, alleging that defendants were fraudulently disposing of their property, and caused attachments to be levied upon a stock of goods in defendants' storehouse in the town of Dyersburg, Tenn. On the same night the attachments were levied, to wit, December 3, 1895, Katz Bros. procured judgments aggregating about $3,800, to be rendered against their firm, before a Justice of the Peace of Dyer County, in favor of certain relatives and friends. Instanter executions were issued upon these judgments, which, by consent of the Sheriff, who

had levied the attachments, were levied upon the same stock of goods subject to the prior levy. On December 9, 1895, on motion of complainants in the attachment cases, a receiver was appointed to take charge of the stock of merchandise and sell the same. About two o'clock A.M., on December 10, 1895, and before the receiver had taken charge, the entire stock of goods was destroyed by fire. Katz Bros. were insured against loss by fire on this stock of merchandise in the aggregate amount of $10,500. Complainants thereupon filed amended and supplemental bills in these causes against the defendant insurance companies, attaching the policies and seeking to subject their proceeds to the satisfaction of their claims.

Defendant insurance companies denied any liability on said policies, and, among other defenses, relied principally upon the following clause contained in each of the policies, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any change, other than by the death of the assured, take place in the interest, title or possession of the subject-matter of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment or by voluntary act of the assured, or otherwise." The contention made on behalf of the insurance companies is that the levy of the attachments and executions invalidated the policies, under the express provisions of this clause. The Chan-

cellor was of opinion that the levies of the attachments and executions did not render the policies void, and did not cause any increase of hazard, and that defendant insurance companies were liable on said policies to complainants to the extent of their respective debts, and so decreed.

The Chancellor further found that when the fire occurred the key to the storehouse in which said stock of merchandise was stored was still in the possession of the Sheriff. The Court further found that the stock of goods was worth more than $10,-500, the amount of the insurance.

Defendant insurance companies appealed, and have assigned errors. The second assignment is, that the Chancellor erred in holding that the levy of the attachments and executions by the Sheriff and Constable, and the possession of said officers under their levies and the appointment of a receiver, did not render the policies void under their terms, provisions, and stipulations. It will be observed that each of the policies provides that if any change takes place in the interest title, or possession, whether by legal process or judgment or otherwise, the entire insurance shall be void, excepting, however, a change of occupants without increase of hazard.

The argument is, that the levy of the attachments and executions worked such a change in the title, interest, and possession of the subject-matter of the insurance as avoided the policies. It is argued that the limitation contained in the clause, "except change

of occupants without increase of hazard," refers alone to cases where real estate is the subject of insurance, as the word "occupant" clearly indicates. It is said further, that if the word "occupant" may properly be applied to personal property as the subject of insurance, it can only limit the words "possession and interest," and not the word "title." It is further insisted, that if the word "occupants" be construed to limit the entire phrase "interest, title, or possession," the proof shows an "increase of hazard," which, by virtue of said clause, avoids the policy. It is not true, as assumed by counsel for appellants, that the word "occupant" has reference always to real estate. As shown by counsel for appellees, the words occupant and occupancy are frequently used in connection with personal property by commentators and lexicographers. Blackstone, in chapter 26, book 2, page 400, *et seq.*, under the head of "Title of Things Personal by Occupancy," says: "Whatever movables are found upon the surface of the earth or in the sea, and unclaimed by the owner, they belong to the first occupant or fortunate finder." In a subsequent part of the chapter "accession" is used where title of realty by "occupancy" is discussed. And in the same chapter, on page 399: "A property or title in goods and chattels movable may be acquired by occupancy, which was the only and primitive method of acquiring property at all." See, also, Bouvier, title "Occupancy and Occupant;" Broom's Legal Maxims, p. 355.

Richardson's Dictionary defines to occupy: "To take or seize, to hold or keep possession of, to possess." Standard: "To have in possession and use." Webster defines occupant thus: "One who occupies or takes possession; one who has the actual use or possession, or is in possession of a thing." Worcester: "One who has the actual use or possession of a thing."

The case of *Walradt* v. *Phœnix Ins. Co.*, 136 N. Y., 375 (S. C., 32 Am. St. Rep., 752), presents a striking analogy in its facts and the questions of law involved to the case now in judgment. The suit was upon an insurance policy which contained a clause identical in terms with the one at bar. The Court said, viz.: "We must first determine what the parties to the contract intended when they made use of the terms 'change in interest, title, or possession of the subject of insurance, whether by legal process,' etc. The change of possession produced by the levy and the action of the Sheriff must now be considered. The policy is not avoided, by the terms of the condition referred to, by every change of possession that may take place in the property. A 'change of occupants without increasing the hazard' is excepted from the operation of the condition, and does not invalidate the insurance. Counsel for the defendant argues that the exception in the condition does not apply when personal property is the subject of the insurance, and does not apply in this case, as there cannot be an occupant

of goods in a store consistent with the ordinary and appropriate use of language. The word 'occupant' is certainly sometimes used with reference to personal property. When the subject of insurance is a ship—a building not attached to the soil so as to become part of the realty or other things of like character, as, for instance, a tent or a chair or a sofa, the term 'change of occupants' would, it will be admitted, be appropriate. When it is used in reference to goods in a store, its fitness is not at first glance so appropriately apparent, but, as the words of the policy were used to meet all cases, we have no right to say that the exception in the condition was not designed to apply when goods were the subject of insurance, merely because the term 'change of occupants' does not seem to be the most natural and appropriate. A large part of the contracts of insurance now entered into relate to personal property, and to hold that such an important exception, as that now under consideration, to the broad terms of a condition had no application to such contracts, would make the rights of the parties turn upon the literal meaning of a word, and to the meaning most in use. What the parties intended was that a change in the control and dominion over the property should not avoid the policy, unless such change rendered the risk more hazardous. A change in the possession of a store of goods must, moreover, refer to the place where the goods are situated. In this case they

are described as situated in a brick store. The place where the goods were kept, though not the subject of insurance, was an important element in the risk, and it was natural and proper for the parties to provide against a more hazardous change in the occupancy of that place, and hence the parties agreed that in case the possession of the goods changed, that fact alone would not avoid the policy, unless the occupancy of the place where they were was also changed in such manner as to become more hazardous. In this way the words of the exception can be given their ordinary and natural meaning, and the exception itself can have effect. It is only in a plain case that we are warranted in saying that the parties have used language not intended to have any application to the subject-matter of the contract." See, also, *German Fire Ins. Co.* v. *Home Ins. Co.*, 144 N. Y., 195; *Wood* v. *American Fire Ins. Co.*, 149 N. Y., 382, where the Walradt case is approvingly cited. We think that case presents a conclusive answer to the argument submitted by counsel for insurance companies, and no further discussion is needed on this branch of the case.

It is argued, however, by counsel for appellants, that, whether the proviso applies to real or personal property, or both, in no event could it refer to or limit the preceding word "title," and that a change of title, whether the risk is increased or not, would terminate the policy under this clause. The argument is, that under the decisions of this Court,

the levy of an execution invests the levying officer with the title to personal property. Citing *Pennebaker* v. *Tomlinson*, 1 Tenn. Ch., 603; *Brown* v. *Allen*, 3 Head, 429; *Bradley & Dortch* v. *Kesee*, 5 Cold., 226; *Connell* v. *Scott*, 5 Bax., 598; Freeman on Executions, Sec. 268.

It is well settled in this State, that the levy of an attachment does not divest the debtor of the title to the property, but simply creates a lien upon it. *Green* v. *Shaver*, 3 Hum., 138; 4 Lea, 525; 6 Lea, 58; 1 Pickle, 668; *Snell* v. *Allen*, 1 Swan, 208; *Connell* v. *Scott*, 5 Bax., 598.

It is insisted by counsel for complainants, in an argument evincing much research and ability, that the levy of an execution on personal property vests in the officer a special or limited property, and does not divest title out of the debtor. It is argued that this is so because the debtor may sell the property subject to the right of possession in the officer, and, further, that the mere payment of the debt by the debtor operates as a discharge of the execution, and causes the possession to revert instanter to the debtor, without a decree or conveyance. *Overton* v. *Perkins*, 10 Yer., 329; *Tyler* v. *Dunton*, 1 Tenn. Chy., 361; *Pennebaker* v. *Tomlinson*, 1 Tenn. Chy., 602.

It is said in several of our cases that, by the levy of an execution, the title of personal property levied on passes to the officer, and that this is so because a seizure to the value of the debt *prima*

facie satisfies it and discharges the debtor. *Brown* v. *Allen*, 3 Head, 429; *Bradley* v. *Kesee*, 5 Cold., 226; *Connell* v. *Scott*, 5 Bax., 598; *Evans* v. *Barnes*, 2 Swan, 293.

Other cases speak of the possession of the levying officer as a limited or special property in the goods. *Malone* v. *Abbott*, 3 Hum., 533; *Evans* v. *Barnes*, 2 Swan, 293; Caruthers' History of a Lawsuit, Sec. 331 (Martin's Edition).

A careful review of the cases will probably show that the terms were used interchangeably, and mean that the title thus acquired by the Sheriff is not absolute, but only for the purpose of satisfying the execution debt. However this may be, the levy in this case was subordinate to the attachment levy, and contingent upon any surplus arising after the satisfaction of the attachments. The levy of the execution was merely constructive, and did not change the status of the property or its custody or control. Since, then, these levies were dependent and made with the consent of the Sheriff to reach a contingent surplus, there is no merit in the contention that the policies were thereby vitiated.

It is next insisted by appellants that there was in fact an increase of risk or hazard, and, therefore, the policies became void notwithstanding the exception. It suffices to say the record fails to show there was any increase of the risk. The situation of the stock of goods after the levy was identical with that surrounding it prior to the levy.

In the Walradt case, *supra*, the New York Court, upon a state of facts precisely like that in the case at bar, even to the removing of the insured from the store, and the locking up of the store, and the taking possession of the keys by the Sheriff, submitted to the jury the question whether, under the circumstances, the condition of the goods was more hazardous after the levy than before. The jury answered the question in the negative.

And in an early case, decided by the Pennsylvania Supreme Court in 1841 (*Franklin Ins. Co.* v. *Findlay*, 6 Wharton, 483; S. C., 37 Am. Dec., 430), that Court found that the Sheriff had levied the execution in his hands upon a stock of goods, had put the execution debtor out of doors, had fastened the shutters, locked the doors, and took and kept the keys. Say the Court in the latter case: "From the evidence, it appears that the goods remained precisely in the same situation after the seizure that they were in before. It is said the Sheriff fastened down the windows, closed the window shutters, and locked the doors, and, having done this, took and kept the keys. The fire happened in the night, long after the usual time of closing stores and ceasing to do business in them—indeed, after all citizens had gone to bed—so that the storehouse was really in the same situation at the time of the fire that it doubtless would and ought to have been had no seizure been made. The Sheriff had the keys and was away; but that is immaterial, because it had

nothing to do with the origin of the fire, and could not, in the least degree, prevent the goods from being destroyed or saved, for the doors could have been forced open had it been thought that it would have availed anything in as short a time without the the keys as they could have been opened by the use of the keys. There is no ground, so far as the evidence goes, upon which any increase of risk can well be imagined."

Other questions of fact were disposed of orally, and the decree of the Chancellor is affirmed.

MEMPHIS BETHEL *v.* BANK.

(*Jackson.* May 11, 1898.)

1. CORPORATION BONDS. *Rights of holder as collateral security.*

One who, in good faith, receives negotiable corporation bonds from the ostensible owner as collateral security for his individual debt, without knowledge or notice, actual or constructive, that the depositor held same as trustee, or that the transfer was made in breach of his trust, will be protected against the true owner or *cestui qui trust* to the extent of the amount justly due on the debt thereby secured. (*Post, pp. 131–135.*)

Cases cited: Smith *v.* Railroad, 91 Tenn., 221; Caulkins *v.* Gaslight Co., 95 Tenn., 693; Merritt *v.* Duncan, 7 Heis., 156; Taylor *v.* Pope, 5 Cold., 413; Ramsey *v.* Clark, 4 Hum., 243; Stephenson *v.* Landis, 14 Lea, 433; Van Wych *v.* Norvill, 2 Hum., 195; McFerrin *v.* White, 6 Cold., 499; Causey *v.* Yates, 8 Hum., 606; Oppenheimer *v.* Bank, 97 Tenn., 97.

2. INNOCENT PURCHASER. *Usury.*

An otherwise innocent holder of negotiable paper as collateral security will not be denied protection to the extent of the amount lawfully due on the secured claim, by reason of the fact that some usury may have been originally included therein. (*Post, pp. 132, 133.*)

Cases cited: McFerrin *v.* White, 6 Cold., 499; Causey *v.* Yates, 8 Hum., 606; Oppenheimer *v.* Bank, 97 Tenn., 97; Ramsey *v.* Clark, 4 Hum., 243; Stephenson *v.* Landis, 14 Lea, 433.

FROM SHELBY.

Appeal from Circuit Court of Shelby County.

L. H. ESTES, J.

C. W. HEISKELL and J. R. FLIPPIN for Bethel.

METCALF & WALKER for Bank.

WILKES, J. The complainant is a charitable corporation. It owned certain taxing district bonds, payable to bearer, and being for $1,000 each. The treasurer of the corporation pledged two of these bonds to the Continental National Bank for a loan of $2,000 for individual account, executing his note, with the bonds as collateral, in the usual form. The corporation received no benefit from this loan, and did not authorize it, nor give any authority for the pledge or use of the bonds as collateral. The original note for which the bonds were pledged was discounted by the bank at seven per cent. The note was, from time to time, renewed, sometimes at seven and at other times at eight per cent. discount, the last renewal of the note being given October 5, 1895, payable thirty days thereafter.

On October 28, 1895, the Bethel notified the bank that it was the owner of the bonds, and demanded delivery of same or payment of their value, without tendering the amount due the bank on the note. The demand was refused, and the bank sold the bonds February 7, 1896, for $2,025, their market value, and applied the proceeds to the payment of the note.

It is shown that the treasurer had been, and was at the time, a man of financial and moral standing; that the loan was made by the bank in the usual

way and at the usual bankable rate, and that the bank had no knowledge or notice or reason to suspect that the treasurer did not own the bonds and had no right to pledge them. They were evidently used under the belief that they could and would soon be redeemed without injury to anyone.

The Bethel sought to replevy the bonds, but not being able to seize or get possession of them, it prosecuted this action of detinue for their value.

The only question insisted upon in the record, all others being waived, is whether the bank, under this state of facts, can hold the bonds, or their proceeds, against the Bethel, which is the legal owner. It is conceded that the owner of specific personal property may retake it from any person who has received it from one who, through breach of trust or theft, has obtained possession of it, and transferred or delivered it to another, even though the latter is an innocent purchaser, and has paid full value for it. *Taylor* v. *Pope*, 5 Cold., 413, and cases cited; *Van Wych* v. *Norvill*, 2 Hum., 195. It is also conceded that the rule does not apply to negotiable securities, bills of exchange, bonds, and notes, provided they come into the hands of an innocent holder for value in due course of trade. 20 Johns., 645; *Van Wych* v. *Norvill*, 2 Hum., 195; Daniel on Neg. Insts., 780.

It is insisted that there cannot be an innocent holder for value of forged paper, or paper executed under duress, or paper deposited as an escrow and

put in circulation before condition performed, and many other cases are instanced. Likewise it is insisted there can be no innocent holder for value in due course of trade when the contract is usurious between the parties, as in this case. Counsel for plaintiff cites, in support of this contention, *Ramsel* v. *Morgan*, 6 Wend., 575; *Hall* v. *Wilson*, 16 Barb., 555. But these cases are not in accord with the later case of *Williams* v. *Tift*, 36 N. Y., 319, and are not in line with other authorities or those of our own Court.

In case of *Oates* v. *First Nat. Bank*, 100 U. S., 10 Otto., 239–248, it was held that the lender is a holder for value when he takes collateral security for the loan, even though the loan be usurious.

In *McFerrin* v. *White*, 6 Cold., 499, it was held that if a note be void, the security given for it is also void, but if it is valid to some extent, and if the usury do not appear on the face, it is valid to the extent of the money loaned and legal interest thereon, and only void as to the usurious excess. See, also, *Causey* v. *Yates*, 8 Hum., 606, and the recent case of *Oppenheimer* v. *Bank*, 13 Pickle, 97.

The principle is that the holder is entitled to recover only the actual amount paid out and legal interest, and to that extent is an innocent purchaser. *Ramsey* v. *Clark*, 4 Hum., 243; *Stephens* v. *Landis*, 14 Lea, 433.

It has been held that the purchaser of negotiable corporation bonds from the ostensible owner, though

he be in fact only a trustee, and his sale a breach of trust, confers perfect title upon the buyer, even against the *cestui que trust*, if the purchase was in good faith, for full value and without knowledge or notice, actual or constructive, of the existence of the trust. *Smith* v. *Railroad*, 7 Pickle, 221. To the same effect we cite *Caulkins* v. *Gaslight Co.*, 1 Pickle, 693; *Merritt* v. *Duncan*, 7 Heis., 156.

In Rand on Commercial Paper, it is said: "When negotiable securities are stolen, the owner may pursue them, or the proceeds of them, until they reach the hands of a *bona fide* holder for value before maturity. But trover will not lie for them against such holder, although he may have purchased directly from the thief. But a *bona fide* holder who has received them by way of collateral, will only be protected as such to the extent of the debt secured." 3 Rand Com. Paper, Sec. 1683. See, also, 2 Daniel Neg. Insts., Sec. 1496; *Murray* v. *Lardner*, 2 Wall., 110; *Seybell* v. *Nat. Currency Bank*, 54 N. Y., 288.

These principles are decisive in this case. The plaintiff allowed its treasurer to have possession of its bonds. They were negotiated by him to the bank, which had no notice of his want of ownership or authority to pledge them. There was nothing to put the bank on its guard or arouse its suspicion. In such case it cannot be made to suffer the unavoidable loss which must fall upon one or the other of the parties. The Bethel could have

protected itself by requiring a sufficient official bond from its treasurer, or by making deposit of its bonds so as to prevent their being put upon the market, whereby innocent purchasers might be implicated, or the bonds could have been so marked and labeled as to carry notice of their ownership whenever or wherever presented.

The judgment must be affirmed with costs.

ERKMAN v. CARNES.

(*Jackson.* May 14, 1898.)

1. SUMMARY PROCEEDINGS. *Obtain, when.*

Summary proceedings are in derogation of common law, and obtain only when authorized by statute strictly construed.

Cases cited and approved: Powell *v.* Fowlkes, 5 Bax., 649; Williamson *v.* Burge, 7 Heis., 119; Voorheis *v.* Dickson, 1 Sneed, 348; Wingfield *v.* Crosby, 5 Cold., 241.

2. SAME. *Does not lie for default of officer, when.*

A summary proceeding by mere motion is not an admissible remedy for the default of an officer in failing to execute and make due return of an attachment writ issued by a Justice of the Peace.

Code construed: § 5979 (S.); § 4942 (M. & V.); § 4167 (T. & S.).

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. J. S. GALLOWAY, J.

W. A. DUNCAN for Erkman.

TURLEY & WRIGHT for Carnes.

WILKES, J. The only question presented by the record is whether an officer is liable, on motion or

in a summary proceeding, where he fails to execute and make due return of an attachment writ issued by a Justice of the Peace. Summary proceedings, being in derogation of the common law, only exist when authorized by statute, and such statutes must be strictly construed. *Powell* v. *Fowlkes*, 5 Bax., 649; *Williamson* v. *Burge*, 7 Heis., 119; *Voorheis* v. *Dickens*, 1 Sneed, 348; *Wingfield* v. *Crosby*, 5 Cold., 241. There is no statute giving authority for a summary proceeding in a case like the present, and the party aggrieved can only resort to his suit or action at law, and is not entitled to a motion, which is a cumulative remedy. The grounds for summary proceedings before Justices of the Peace are set out in the statute (Shannon, § 5979, subsecs. 1, 2, 3, 4), all of which relate to defaults made in regard to executions. Section 5368 provides a penalty for failing to execute and make return of any process, but, by the express words of the statute, it is confined to process issued from a Court of record, which a Justice's Court is not.

We are of opinion the judgment of the trial Judge, in dismissing the action for want of jurisdiction in the Justice of the Peace to entertain a summary proceeding under the facts, is correct, and it is affirmed, with costs.

JACKSON *v.* STATE.

(*Jackson.* May 16, 1898.)

NATIONAL GUARD. *Exemption from road duty.*

Members of the National Guard of this State are exempt from road service during the entire term of enlistment, whether engaged in active or field service or not.

Acts construed: Acts 1897, Ch. 112.

FROM SHELBY.

Appeal in error from Criminal Court of Shelby County. L. P. COOPER, J.

GEO. L. HARRIS for Jackson.

Attorney-general PICKLE for State.

BEARD, J. The plaintiff in error was a member of the National Guard of this State, and while such was called upon to discharge road duty. Refusing to do this, he was indicted, convicted, and fined for this refusal. The trial Judge declined to give the plaintiff in error the benefit of the statutory exemption. The right to exemption set up in this case

rests on Sec. 5, Ch. 112, Acts 1897, and is in these words: "*Be it further enacted*, That service in the National Guard shall be accepted in lieu of all road duty, poll taxes, and jury duty while actually in the military service of the State."

While the phraseology of this section is not so fortunate as it might be, yet we think it clear, especially when the entire Act and that of which it is amendatory is considered, it was the purpose of the Legislature, by this provision, to give the benefit of this exemption to members of the National Guard during the term of their enlistment, whether engaged in active or field service or not.

The Act in question is entitled "An Act to reorganize the National Guard of the State of Tennessee, and to increase its efficiency, and so amend Chapter 159, Acts 1897, entitled 'An Act to reorganize the militia of the State of Tennessee, and for the government of the same,'" and its provisions all look to the placing of the troops composing the guard in a condition where the best results might be obtained when real service should be required. To encourage enlistment in this organization, and to give some recompense to those who become its members and submit themselves to its discipline and give of their time to military training, we think the Legislature provided this exemption.

The members of the guard are actually in the military service of the State during their term of enlistment, subject to the order of their superiors, and

liable to be called upon at any moment to perform the active work of soldiers.

If it be true that this section exempts them from the necessity of doing road or jury duty only while in the field as such, it is evident that so far as these duties, at least, are concerned, it would be without practical value, for, while actively engaged in military service they could not well perform their civil duties, and it would hardly require the aid of a statute to exempt them from their discharge.

It follows that the judgment of the lower Court must be reversed, and the case having been tried by the Judge of that Court without the intervention of a jury, an order of dismissal of the prosecution will be entered here.

FAVER *v.* PARKER.

(*Jackson.* May 21, 1897.)

1. ADMINISTRATION. *Liability of administrator.*

The administrator is required by statute to manage and protect a fund set apart as year's support for minors until a guardian shall be appointed, and then to pay same over to him, and, if he fails in this, and without resistance permits the Probate Court to pass an invalid order directing said fund to be paid to an unauthorized person, and, in obedience to such order, pays the fund over to such person, and it is lost, he will be held personally responsible to the minors for the same, with interest. (*Post, pp. 142–145.*)

Code construed: § 4024 (S.); § 3129 (M. & V.); § 2290 (T. & S.).

Case cited: Rhea *v.* Greer, 86 Tenn., 59.

2. SAME. *Same.*

But the administrator will be entitled to credit in such case for any amounts that may have been refunded or actually devoted to the benefit of the minor. (*Post, pp. 144, 145.*)

FROM SHELBY.

Appeal from Chancery Court of Shelby County. JNO. L. T. SNEED, Ch.

CASSELBERY & MARTIN for Faver.

PETERS, ROBERTS & NORFLEET for Parker.

Faver *v.* Parker.

WILKES, J. This bill is brought by the next friend of two minors, Gertie L. and Nancy N. Faver, to recover against H. B. Parker, a resident of Arkansas, and the Memphis Trust Company as administrator of W. C. Faver, a sum of money ($541.79) and interest, which was decreed to them as a year's support out of the estate of their father, W. C. Faver, deceased. This sum was paid over to H. B. Parker by the trust company, under an order of the Probate Court of Shelby County, reciting that he was next of kin of the children; that they had no mother; that they lived with Parker, and were cared for by him, and that he was their custodian. It appears from the proof that he was not custodian of the children, nor their next of kin, nor was he caring for the children, but that he obtained the money without bond, and invested the same in building and loan stock, which has since depreciated in value, if not become worthless. It appears that this money was paid over on the petition and application of said Parker, without any proof of the facts alleged, and without any inquiry by the trust company, as administrator, as to the truth of the petition and the matters set out in it, and without requiring any bond or security.

On final hearing, the Chancellor gave judgment against Parker for the amount paid him, and interest, in all, $721.58, in favor of the children, and ordered the recovery paid into Court, subject to its further orders, but declined any relief as to the trust com-

pany, as administrator, upon the ground that it acted in good faith, and under an order of the Court, which had jurisdiction to make such order.

From the decree refusing relief to the minors, against the trust company, they, through their next friend, appealed to this Court on the pauper's oath, and, as to the judgment against him, Parker appealed, but has not perfected or prosecuted such appeal. The contention in this Court for the minor appellants is, that the order of the Probate Court was void, and based upon no proof, and was procured fraudulently by Parker, and that the trust company, as administrator, was negligent in not requiring proof of the matters stated in the petition, and in not seeing that he was the proper party to whom to make such payment; that Parker was insolvent; and that the money had thus been lost through the carelessness of the trust company.

The trust company insists that the Probate Court had plenary jurisdiction to order the fund paid out, and it was not incumbent on it to see that it was paid to the proper party, but that the order of the Court was full and ample protection to it. It made no inquiry, and caused no proof to be taken, but simply paid under the order of the Court and the recommendation of the commissioners appointed to allot the year's support.

It is provided that the administrator shall be trustee for the management of the property set apart for the support of minor children until the appointment

of a guardian, to whom he shall pay it over, taking his receipt. Shannon, § 4024. When there is no guardian it is a dereliction of duty in an administrator, for which he is personally liable, if he fails to reserve the year's allowance for minor children upon his own motion. *Rhea* v. *Greer*, 2 Pickle, 59, 64. There is an active duty imposed upon him to see that the property reaches the guardian of the minors in order that they may receive its benefits, and to allow it to be paid over to an unauthorized person, without any effort to put the Court in possession of the facts necessary for its guidance, or to have a guardian appointed to receive it, is a dereliction of duty. The minors are incompetent, by their minority, to protect their own interests, and in all orders made by the Court touching their funds in the hands of the administrator, it was the duty of the administrator to protect the interest of the minors, as well as its own. The order of the Probate Court in this case cannot protect the administrator, inasmuch as the Court had no jurisdiction to make it, and the company cannot protect itself under such order, because it made no effort to comply with the law or put the Court in possession of the facts necessary for its action.

It appears from the briefs of counsel for both parties, that since this case was appealed to this Court, the defendant, Parker, has paid the larger part of the judgment rendered against him. Whether the payment has been made into Court, or in what

way or to whom paid, does not appear. If the funds have been paid into Court, or if the minors have actually received the benefit of the funds paid in, this will be a discharge *pro tanto* of the liability.

The judgment of the Court below will be reversed, therefore, and a decree will be drawn holding the trust company liable for the amount paid by it to Parker, and interest, and the cause will be remanded to the Court below for a reference to ascertain the amounts paid into Court, or that have been actually received by the minors, and of which they have received the benefit, and for such amounts the judgment will be credited, and only the balance will be collected. The costs of appeal will be paid by the trust company, and the cost of the Court below as adjudged by that Court.

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RAILROAD *v.* WILLIAMS.

(*Jackson.* May 21, 1898.)

1. TAXATION. *Assessment of steamboat belonging to railroad.*

A County Tax Assessor has no authority to assess a steamboat belonging to a railroad company, and used by it exclusively in transferring freight and passengers across a river on its line of road. The assessors of railroad properties alone have power to assess such property. (*Post, pp. 147, 148.*)

2. SAME. *Recovery of taxes paid under protest.*

Only actions for State, and not actions for county or city taxes paid under protest, are required to be brought within thirty days after the payment. (*Post, p. 148.*)

Cases cited: Saunders *v.* Russell, 10 Lea, 299; Nashville *v.* Smith, 86 Tenn., 213.

3. SAME. *Same.*

A tax that is illegal in the sense of being unauthorized by any law, if exacted and paid under protest, and to save seizure of property, may, upon principles of the common law, be recovered back by the taxpayer. (*Post, p. 148.*)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. J. S. GALLOWAY, J.

W. G. WEATHERFORD for Railroad.

GEO. B. PETERS for Williams.

WILKES, J. This is a suit to recover taxes paid for State, county, and municipal purposes. It is in-

sisted the taxes were paid under duress and protest, and were illegal and unjust. The case was heard in the Court below upon an agreed statement of facts. There was judgment that the plaintiff was entitled to recover back the amount of State taxes paid, but was not entitled to recover back the county and city taxes. From so much of the judgment as refused to give judgment for the county and city taxes paid by the plaintiff, he has appealed and assigned errors.

It appears that the tax complained of was assessed by the County Assessor upon the steamer *General Pierson*. It is agreed that this steamer is used exclusively in transferring freight and passengers across the Mississippi River, at Memphis, from the tracks of the Little Rock & Memphis Railroad, in Arkansas, to its terminal tracks in Memphis, and is the property of the railroad company. It is insisted that, being railroad property, it is not subject to assessment by the County Assessor, but only by the State Railroad Assessors. It appears that it was not assessed by Railroad Assessors as "distributable property" of the railroad company. It does not appear whether it was by them assessed as "localized property" or not, and this is immaterial.

The trial Judge was of opinion that the tax was assessed by the county Assessor without any authority of law, and gave judgment that the plaintiff recover the portion paid to the State, inasmuch as it had

been paid under protest, and sued for within thirty days thereafter, under the statute. The Court was evidently of the opinion that the county and city, not having sued to recover back the amounts paid by them in thirty days, would have no right of recovery, and that their remedy, if any, was by certiorari.

It has been held that the Act prescribing that taxes due the State must be paid, and suit brought within thirty days if deemed illegal and unjust, has no application to county and city taxes. *Saunders* v. *Russell*, 10 Lea, 299; *City of Nashville* v. *Smith*, 2 Pick., 213.

The effect of this is to leave the common law remedies in force in such cases, and the county and city, if the tax was illegal in the sense of being unauthorized by any law, could sue to recover it back, if exacted and paid under protest and to save seizure of property, and the thirty days' limit would not apply in such case.

We are of opinion there was no authority for such assessment by the county Assessor. In the entire absence of authority to assess the tax, it could be recovered back if the plaintiff was compelled to pay it to save his property from seizure and sale.

The question of a tax unequally laid, where the County Assessor had authority to make an assessment, and the proper remedy in such cases, does not arise under the facts in this case, and is not considered.

There was an entire lack of power and authority to make this assessment, as the boat is clearly the property of the railroad company, and used in its business as a common carrier, and assessable, in the first instance, only by the Railroad Assessors. The fact that the Railroad Assessors failed to assess the boat as railroad property could not confer the right or power on the County Assessor to make such assessment. The Comptroller is the proper party to assess such property when it has escaped assessment.* *State* v. *Railroad*, 12 Pickle, 385. The County Assessor has only the authority conferred on him by the statute.

The judgment of the Court below is reversed, and proper judgment will be rendered here for the amount of taxes improperly collected from the plaintiff by the county and city, respectively, and the costs of the cause will be paid equally by the county and city.

* The State Tax Assessors now perform this duty under Acts 1897, Ch. 5, Sec. 20. —REPORTER.

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McHale *v.* Wellman.

(*Jackson.* May 21, 1898.)

1. Circuit Court. *Findings by Judge.*

The statutory requirement that the Judge shall, if requested by either party, render his decision "in writing, stating the facts found and conclusions thereon," is imperative, and a failure to comply therewith is reversible error. (*Post, pp. 151, 152.*)

Code construed: § 4684 (S.); § 3673 (M. & V.); § 2959 (T. & S.).

Case cited and approved: Stanley *v.* Donoho, 16 Lea, 495.

2. Same. *Same.*

A general finding, though in writing, is insufficient under the statute. The finding should consist of a concise and distinct written statement, in its proper order, of each material fact, separate from the general conclusions of law or fact drawn by the trial Judge. (*Post, p. 153.*)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. Estes, J.

J. H. Malone for McHale.

Ralph Davis and H. F. Dix for Wellman.

Wilkes, J. This is an action of replevin for the race horse, Johnnie McHale. The case was tried before the Judge without a jury, and there was a judgment for the defendant, Rosa Wellman, for the horse. The Court fixed the value of the horse at

$1,500, and on this sum computed interest, $115.75, from the date suit was brought to time of trial, and fixed the damages for detention at $100, making a total of $1,715.75, for which an alternative judgment was rendered if the horse was not returned. There was a demand, properly made under the statute (Shannon, § 4684), for a finding of facts and conclusions by the trial Judge, to which he assented, and there was a written finding by him. So much of it as is material is as follows:

"The evidence in the case is exceedingly conflicting, but the law imposes on plaintiff the burden of making out his case by a preponderance of evidence. This he has failed to do. The Court finds that defendant, Rosa Wellman, is the owner of, and entitled to the possession of, the race horse, Johnnie McHale, and at the time of bringing this suit he was worth $1,500; that Wellman, on December 27, 1894, made an agreement of partnership with plaintiff, McHale, to run Stonewall and Johnnie McHale, which was subject to be vacated at any time; that the plaintiff, McHale, has failed to keep an itemized account, but has charged at the rate of $7.42 per day for the horse; that no actual damages have been proven except winnings—which the evidence indicates were $100—from the New Orleans races; and that the Court gives this $100 as damages, but allows nothing for damages since November 25, 1895, the date of suit, or from the fall races at St. Louis, in 1895. L. H. ESTES, *Judge*."

McHale *v.* Wellman.

Appellant, McHale, excepted to the finding, and moved for additional findings, upon the ground that the memorandum filed by the trial Judge does not comply with the statute; that no facts were stated bearing upon the question of the ownership of the horse, which was the vital point in the case; that the Judge merely stated his conclusions of fact and law; that the evidence did not sustain the claim of McHale; that the burden of proof was upon him; and that, in fact, it was nothing more than a general finding.

We are of opinion there is error in the proceedings of the learned trial Judge. There were many facts pro and con, and it was only by weighing and comparing them that a conclusion could be reached. But there is no attempt here to set out these facts nor the contentions thereon, but a simple finding that the plaintiff had failed to make out his case. In the motion made, many of these facts were set out, and the Court was asked to find on each of fourteen separate contentions and differences between the parties. The Court declined to make any further finding of facts, and, after trial on the merits, overruled a motion for a new trial, and plaintiff appealed. Defendant also filed the record on writ of error as to the question of damages.

The statute (Shannon, § 4684) says: "Upon the trial of a question of fact by the Court, the decision, if requested by either party, shall be given in writing, stating the facts found and conclusions

thereon, which shall constitute a part of the record." This statute is imperative, and the Court's failure to comply with it is ground for reversal. *Stanley* v. *Donoho*, 16 Lea, 495.

These findings should consist of a concise and distinct written statement, in its proper order, of each specific fact found, separate from the general conclusion of law or fact drawn by the trial Judge. Only ultimate or controlling facts need be found, and not the evidence upon which they are based. Counsel cannot dictate to the Court what facts shall be found, nor is he required to do so, but if none are found, or they are so defectively found as not to be a substantial compliance with the statute, the party deprived of the finding is entitled to a reversal. See upon the general subject, 2 Elliott's Gen. Prac., Secs. 969–71, 974, 980; 20 Am. & Eng. Enc. L., 698; 8 Am. & Eng. Enc. Prac., 934, 935, 939, 941, 950, and various cases there cited.

There being no substantial compliance with the statute in this case, the judgment of the Court below must be reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal. Costs of Court below will await final adjudication by the Court below.

BANK *v.* MEMPHIS.

(*Jackson.* May 21, 1898.)

1. TAXATION. *Assessment of banks.*

A provision in a general assessment Act that banks and other like corporations shall not be assessed upon their capital stock, but that their shareholders shall be assessed and taxed upon the market value of their shares, is a valid and constitutional method for the taxation of banks and other like institutions, and forbids the assessment of their capital stock under other general provisions of the Act requiring all property to be taxed. (*Post, pp. 158–160.*)

Constitution construed: Art. II., Sec. 28.

Acts construed: Acts 1895, Ch. 120.

Cases cited: State *v.* Butler, 86 Tenn., 631; Street R. Co. *v.* Morrow, 87 Tenn., 417; State *v.* Bank, 95 Tenn., 226.

2. SAME. *Charter exemption does not exist.*

A bank whose charter provides that it "shall pay to the State an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," is held, upon authority of more recent decisions of the Supreme Court of the United States, and contrary to the former decisions of this Court, to have no exemption of its capital stock from *ad valorem* taxation and *a fortiori* none from privilege taxation. (*Post, pp. 160–167.*)

Case cited and approved: 161 U. S., 134.

Cited and overruled: Memphis *v.* Bank, 91 Tenn., 556; State *v.* Butler, 13 Lea, 400; Memphis *v.* Insurance Co., 6 Bax., 527; Memphis *v.* Bank, 91 Tenn., 551; Bank *v.* State, 9 Yer., 490.

3. SAME. *Res adjudicata.*

The plea of *res adjudicata* is limited in its effect, in tax cases, to the taxes actually in litigation, and is not conclusive in respect of other taxes assessed for other and subsequent years. (*Post, pp. 167, 168.*)

Bank *v.* Memphis.

Cases cited and approved: State *v.* Bank, 95 Tenn., 231; 94 U. S., 351; 144 U. S., 610; 146 U. S., 279; 153 U. S., 301.

Cited and disapproved: 167 U. S., 371.

4. SAME. *Statute of limitations.*

A city's claim for privilege taxes is subject to the bar of six years prescribed by Acts 1885, Ch. 24, for all taxes, but not to the bar of three years prescribed by the general revenue Act of 1895, Ch. 5, for State and county taxes. (*Post, p. 168.*)

Acts construed: Acts 1885, Ch. 24; Acts 1895, Ch. 5.

FROM SHELBY.

Appeal from Chancery Court of Shelby County. STERLING PIERSON, Ch.

CARROLL, CHALMERS & MCKELLAR for Bank.

METCALF & WALKER for Memphis.

MCALISTER, J. This record presents a question of taxation. Complainant bank filed its bill in the Chancery Court of Shelby County to enjoin the city of Memphis and county of Shelby against the collection of taxes on its capital stock, for the years 1896 and 1897. Two grounds of relief were outlined in the bill, viz.:

(1) That the capital stock of said Union & Planter's Bank is exempt from general taxation by its charter, or act of incorporation, which provides that "said company shall pay to the State an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all

other taxes," and that this exemption has been adjudged by this Court in two cases, which have the force of *res adjudicata.*

(2) That, conceding he taxability of the capital stock, the Legislature has made no provision for its assessment, but, on the contrary, has expressly declared, by Sec. 10, Acts 1895, that "no tax shall hereafter be assessed upon the capital stock of any bank, banking association, or loan, trust, insurance, or investment companies, but the shareholders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock therein."

The city and county answered the bill, denying the want of power in the assessing officers to assess the capital stock of complainant bank, and denying further that the charter of said bank exempted its capital stock from taxation, or that said matter is *res adjudicata*, or that complainants are estopped by judgment.

The city and county also filed cross bills for the collection of their taxes—the amounts due the city for the year 1897 and the county for the year 1896, and also for the collection of city privilege taxes.

It was admitted, in a stipulation of agreed facts, that the capital stock of complainant bank had been assessed by the Board of Equalization of Shelby County, for the year 1896, at $217,000, and that complainant bank could not rightly contest the assessment so ar as the amount thereof was concerned.

The Comptroller's certificate was attached to the stipulation, showing the payment annually of the charter tax of one-half of one per cent.

The Chancellor, upon the hearing, was of opinion the bank was not liable for any of said taxes, and thereupon dismissed defendant's cross bill and perpetuated the injunction. Defendants appealed, and have assigned errors, as follows, to wit:

"1. The Court below erred in holding that it was bound to follow the case of the *State, for the use of Memphis*, v. *Union & Planters' Bank*, 7 Pickle, 551, and to decree in favor of the exemption from general taxation of the capital stock of the complainant bank. It should have been decreed that the capital stock was subject to general taxation.

"2. In any event, the Court should have held that the judgment in the said case of *State, for the use of Memphis*, v. *Union & Planters' Bank*, 7 Pick., *supra*, was not *res adjudicata* as against the State or county—the county not being a party to that proceeding at all, and the State a nominal party only—the only real party thereto being the city of Memphis.

"3. It should have been decreed that the capital stock was legally assessed at $217,000; that the amounts due to the city and county, respectively, were as shown by the exhibits to the bill, and judgment in favor of the city and county, respectively, should have been rendered on the cross bill.

"4. The bank should have been adjudged liable to the city for an annual privilege tax of $600 under the provisions of the Act of 1889, Sec. 2, Subsec. 7, by which the Legislature enacted a municipal privilege tax on each banking institution of $1 on every $1,000 of capital stock paid in—the capital stock of the complainant bank being $600,000."

The first question to be decided, is whether the property now sought to be taxed has been assessed, for assessment must precede taxation, and is an indispensable condition of the right to collect a tax.

As already stated, the Assessment Act of 1895 provides that "no tax should thereafter be assessed upon the capital stock of any bank or banking association, but that the shares of stock should be assessed to the individual shareholder." Here is a direct legislative prohibition against any assessment of capital stock to the corporation for purposes of taxation, and a different system for the assessment of such stock is provided. The assessment of the capital stock of complainant bank to the corporation, was made by the Board of Equalization of Shelby County, under Sec. 51, Ch. 120, Acts of 1895, which provides "that the County Board of Equalization shall have the power to add to the assessment lists any property subject to taxation and not assessed by the regular Assessor." The Act of 1895 further provides, viz., "that all property, real, personal, and mixed, shall be assessed for taxation for State, county, and municipal purposes, except such

as is declared exempt in the next section." After enumerating the exemption, it provides, "All other personal property, whether belonging to individuals, corporations, or firms."

It is insisted on behalf of the city that these general provisions of the Act of 1895 are amply sufficient to justify and require the assessment of the capital stock of this bank, and such being the case, all particular provisions in hostility to the Constitution that all property must be taxed, would fall. The Constitution ordains that all property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. Art. II., Sec. 28.

It is true that, under well-settled decisions of this Court, the capital stock belonging to the corporation and the shares of stock owned by the stockholders, are separate and distinct subjects of taxation, and the taxation of one is not the taxation of the other, nor is the assessment of both subjects duplicate taxation. *Street R. R. Co.* v. *Morrow*, 87 Tenn., 417; *State* v. *Bank of Commerce*, 95 Tenn., 226.

The value of such stock, under the plain provision of the Constitution, is to be ascertained in such manner as the Legislature shall direct. The Legislature in its wisdom has provided for the assessment of stock to the shareholder, and has determined that no tax shall be assessed upon the capital of the corporation. It was clearly within the power of the

Legislature to prescribe this method of taxing bank stock, and, until the system is changed, no *ad valorem* tax can be collected from the corporation on the capital stock. The mandate of the Constitution, requiring uniform taxation of uniform values, is not self-executing, but depends for its enforcement upon appropriate legislation. This very subject is illustrated by a decision of this Court in which the precise point was adjudged.

In *State* v. *Butler*, 86 Tenn., 631, which was a proceeding for the collection of taxes claimed to be due the city of Memphis from the Bank of Commerce, it appeared that the assessment was upon the capital stock of the bank. The Court held that no recovery could be had upon such an assessment, since the Act of 1873 provided that "no tax shall hereafter be assessed upon the capital of any bank or banking association, etc., but the stockholders in such banks . . . shall be assessed and taxed on the value of their shares of stock therein." This decision has remained unreversed and unchallenged from that time to the present.

It is also claimed that said bank is liable to the city of Memphis for certain privilege taxes. In the case of *Memphis* v. *Union & Planters' Bank*, 7 Pickle, 556, an effort was made to collect privilege taxes from this bank for the years 1889, 1890, and 1891, inclusive, and this Court adjudged the bank not liable.

Judge Caldwell said: "Complainant seeks, in addition to what has already been stated, to recover

from the bank $1,800 as privilege taxes for the years 1889, 1890, and 1891. These taxes are claimed from the corporation for the right of exercising its franchises—for the privilege of doing a banking business. Manifestly, the charter tax was intended to cover this right or privilege. The language of the charter implies that, in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted, without further taxation." Citing *City of Memphis* v. *Hernando Ins. Co.*, 6 Bax., 527; *Union Bank* v. *State*, 9 Yer., 490.

In reply to this adjudication, counsel for the city argues, viz.: "It is not in the least denied on our part that this Court has, over and over again, under just such a charter as this, held that the corporation was not liable to a privilege tax. This line of decisions began with the case of Union Bank, 9 Yerger, and runs through all the decisions on that subject down to and including the cases in 7 Pickle. It is, however, never to be forgotten that, throughout this whole line of decisions, this Court was uniformly and consistently holding that under such a charter as this the charter tax was laid on, and the exemption was of the corporation and its capital stock, and that the shares of stock were taxable. All that line of decisions has now been reversed by the Supreme Court of the United States, that Court holding, that under the proper reading and legal effect of the charter, the charter tax is

on, and the exemption is of the shares of stock, and that the corporation gets no exemption whatever under the charter. If it be true, therefore, as it seems undoubtedly to be, that the capital stock is taxable, for the reason that the corporation gets no exemption under the charter, there would seem to be no reason why the corporation should not be liable to a privilege tax, as well as to an *ad valorem* tax. The Court will remember that in the series of cases that were before it on demurrer in 7 Pickle, and on final hearing in 13 Pickle, the privilege tax, under the statute above referred to, was adjudged in every case where they were properly claimed in the pleading and in which it was held that the corporation had no exemption. There is no reason why the same rule of taxation should not apply to the complainant bank."

The decision of this question is therefore necessarily dependent on the determination of the question whether the capital stock of said bank is now liable to taxation. It is insisted, in bar of the claim of the city of Memphis, that the question has already been adjudicated, and two pleas of *res adjudicata* are interposed:

(1) The decrees of the Supreme Court of Tennessee, in the case of *State of Tennessee* v. *Butler*, April term, 1884, wherein it was adjudged that the provisions in its act of incorporation, that the company shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock

subscribed, which shall be in lieu of all other taxes, relieves it of the payment of the taxes now sought to be recovered.

(2) That the decree of this Court, in the case of *City of Memphis* v. *Union & Planters' Bank et al.*, reported in 91 Tenn., 546, adjudged that the commuted tax prescribed by the charter was the grant of an immunity to said bank from the payment of *ad valorem* taxes to the city of Memphis upon its capital stock.

The broad proposition asserted by counsel for complainant bank is that this Court has, by its decrees in *State* v. *Butler*, 13 Lea, 400, and in *State, use, etc.*, v. *U. & P. Bank*, 7 Pickle, 551, conclusively adjudged that the charter of complainant bank exempts both its capital stock and shares of stock from general taxation.

It is not insisted by the bank that there is a judgment estoppel against the county, nor could such an insistence prevail, since the county was not a party to the two cases now relied on as adjudicating the question here presented.

It is well known that the opinion of this Court in *State, use, etc.*, v. *Union & Planters' Bank*, 7 Pickle, 551, was brought about by what this Court deemed to be the true construction and effect of the opinions in the Farrington case, 95 U. S., and the Bank of Commerce case in 104 U. S.

In the 7 Pickle case, this Court said, viz.: "Considering the decision of the United States Supreme Court

in *Farrington* v. *Tennessee*, 95 U. S., 679, and *Bank* v. *Tennessee*, 104 U. S., 493, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both." It was added, that, "as an original question, this Court would hold as held in *Memphis* v. *Farrington*, 8 Bax., and charge the stockholders with an *ad valorem* tax, but is constrained to hold both exempt under the controlling authority of the United States Supreme Court decisions."

Since that time, in Union & Planters' Bank case, 161 U. S., the Supreme Court of the United States held that the Farrington case, properly understood, did not hold that both the shares and capital stock were exempt from taxation. It was further held that the charter tax was on the shares of stock, and such shares were exempt from general taxation. It is nevertheless urged on behalf of the bank that the 7 Pickle case is conclusive in its favor, regardless of the reasons that controlled the Court in pronouncing judgment, and that it is conclusive, also, against taxes for other years. As is well said in the brief for the city, "It would indeed be strange if, under a Constitution such as ours, a mistaken judgment of this Court, declared in most emphatic terms

not to be its own judgment, but to have been surrendered in supposed obedience to that of an appellate tribunal—the United States Supreme Court—can be invoked as a judgment estoppel now that the same appellate tribunal has decided that identical question in favor of the State and against the bank, and that this Court was mistaken in its rendering of their former opinions."

It is argued, however, by counsel for the bank, that the opinion and judgment of the United States Supreme Court in *Union & Planters' Bank* v. *Shelby County*, 161 U. S., ——, did not adjudge the capital stock liable to taxation. The argument for the bank is that the single question involved therein was the taxability of the surplus, and that everything said in the opinion outside of this question was *obiter*. We understand that Court to have decided in the case mentioned, that the surplus and undivided profits of said bank were not exempt, for the reason that the capital stock of said bank was not exempt. The Court said, viz.: "There are two grounds, either of which, if decided in favor of the appellants in this case, would result in upholding the validity of the tax upon the surplus: (1) If it should be held that, by the true interpretation of the charter, the exemption, while applying to the shares of stock in the hands of the shareholders, does not extend to the corporation itself, the tax would be invalid; (2) even if the tax on the capital stock were void, that upon the surplus might

still be upheld on the authority of the case of *Bank of Commerce* v. *Tennessee*, 161 U. S., 134. We have already held in that case that a tax on the surplus was valid, but the question whether a tax on the capital stock of the bank was valid could not be raised there, because the case was before us on writ of error taken to a State Court, and the question in the State Court was decided in favor of the exemption claimed by the bank. This being an appeal from a judgment of the United States Circuit Court, both questions are open for our decision. We think it therefore proper to here decide the question first above stated.

"Various decisions in the Courts of Tennessee have been cited by counsel on both sides as to the meaning of the exemption clause—whether or not it covered the capital stock and the shares also. Generally the Courts of that State held, before the decisions of this Court in *Farrington* v. *Tennessee*, 95 U. S., 679, that the charter tax was laid on the corporate capital stock, and the exemption was of that stock from any further tax. Subsequently to the decision in that case, the State Courts have held that, under the construction given to the clause in the Farrington case and in *Bank of Commerce* v. *Tennessee*, 104 U. S., 493, the tax was on the shares, and the exemption covered both the capital stock and the shares thereof. The decision giving exemption to both classes of property was adjudged alone upon the authority cited. In such a case as

this, where we are to construe the meaning of the clause of the statutes as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the previous decisions of the State Courts, except when they have been so long and firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves, independently of the decisions of the State Courts, whether there is a contract and whether its obligation is impaired. *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S., 244, 256; *Vicksburg S. & P. R. Co.* v. *Dennis*, 116 U. S., 665, 667; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S., 486, 492."

The Court, after a review and discussion of the cases held, viz.: "This determines the liability of the capital stock of the Union and Planters' Bank to taxation, and, of course, it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits."

If, therefore, the principle of judgment estoppel is to be invoked, the last judgment of the highest appellate tribunal determines the taxability of said capital stock.

Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in *New Orleans* v. *Citizens' Bank*, 167 U. S., 371, in which it was held by a majority opinion

that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved.

In *State* v. *Bank of Commerce*, 95 Tenn., 231, we said: "These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case," citing *Cromwell* v. *County of Sac*, 94 U. S., 351; *Nesbett* v. *Riverside Ind. Dist.*, 144 U. S., 610; *W. & W. R. R.* v. *Alsobrook*, 146 U. S., 279; *Keokuk R. R.* v. *Missouri*, 152 U. S., 301. We adhere to that ruling.

The result is that, in our opinion, the capital stock of this bank is not exempt from taxation, but is not liable in the present case because the Legislature has made no provision for its assessment. The city, however, is entitled to collect its privilege taxes for six years next preceding the filing of the bill. The three years' limitation under the Act of the Extra Session of 1895, Ch. 5, Subsec. 7, has no application. That was a general revenue law of the State, and cannot operate as a bar to a claim by the city for its privilege taxes. Such claim is barred only to the extent that it falls within the general statute of limitations as to taxes, found in Chapter 24 of the Acts of 1885, under which all taxes are barred unless suit is brought "within six years from the first of January of the year for which such taxes accrued."

The decree of the Chancellor is reversed, and a decree will be entered in conformity with this opinion.

REINHARDT *v.* NEALIS.

(*Jackson.* May 28, 1898.)

1. CHANCERY JURISDICTION. *Over collection of taxes.*

Acts 1895, Ch. 120, prescribing an *in rem* proceeding for the collection of taxes of that and succeeding years, and incidentally requiring collection of delinquent taxes of former years, where sales are made under that Act, does not repeal or affect the jurisdiction of the Chancery Court to enforce collection of taxes for years anterior to 1895, when a sale is not necessary under Acts of 1895. (*Post, pp. 170–172.*)

Acts construed: Acts 1895, Ch. 120.

2. COLLATERAL ATTACK. *Upon tax title made through Chancery Court.*

In a suit making collateral attack upon a tax title, acquired at chancery sale, for the taxes of a year prior to 1895, it is not competent to show, by matter *dehors* the record of the original case, in order to defeat the Court's jurisdiction to make the sale, that there were taxes due for 1895 or subsequent years, authorizing *in rem* proceedings and sale under Acts of 1895, Ch. 120, and therefore requiring incidentally the collection of taxes for former years without suit. (*Post, pp. 172–174.*)

3. SAME. *General rule.*

A domestic judgment of a Court of general jurisdiction, proceeding according to the course of the common law, cannot be impeached collaterally by the parties to it, where a want of jurisdiction is not apparent upon the face of the record. (*Post, pp. 173, 174.*)

Cases cited and approved: Harris *v.* McClanahan, 11 Lea, 185; Robertson *v.* Winchester, 85 Tenn.. 187; Hopper *v.* Fisher, 2 Head, 256; Kilcrease *v.* Blythe, 6 Hum., 389; Winchester *v.* Winchester, 1 Head, 460; Kindell *v.* Titus, 9 Heis., 727; Pope *v.* Harrison, 16 Lea, 82.

FROM SHELBY.

Appeal from Chancery Court of Shelby County. LEE THORNTON, Sp. Ch.

W. W. GOODWIN and GEO. GILHAM for Reinhardt.

F. H. HEISKELL for Nealis.

BEARD, J. The bill in this cause was filed for the purpose of impeaching a decree entered in another case by the Chancery Court of Shelby County, for the sale of a certain lot in Memphis, enforcing that city's lien for taxes due from the complainant, its former owner, and to avoid a title thereto acquired by one Nealis, as purchaser, under the terms of that decree.

The bill alleges that this property, having become delinquent for taxes due in the year 1895, was so certified by the County Trustee to the Back Tax Attorney appointed by the Comptroller of the State, who, acting under the authority of Sec. 76, *et seq.*, of Ch. 120 of the Acts of 1895, after due advertisement, at a public sale made by him in accordance therewith, struck it off to the State for about $832, this being the aggregate of all the taxes and costs due, including the taxes adjudged in favor of the city in the cause referred to, and that subsequent to the sale by the back tax attorney, occurred the sale at which the defendant, Nealis, bought.

The theory of the bill is that the necessary effect of Chapter 120 of the Acts of 1895 was to repeal, by implication, the pre-existing statutes upon which it is averred rested the proceedings in the Chancery Court resulting in the sale to Nealis, and thus deprived that Court of the jurisdiction to pronounce

the decree under which that sale was made. In other words, the contention of complainant is, that in all cases covered by the Act, so radical is the change in our system of collection of all delinquent revenue, provided by it, that it superseded all prior statutory remedies, and left the Chancery Court without jurisdiction to pronounce the decree in question.

The cause is before us by appeal from a decree dismissing the bill upon a demurrer raising the question as to the power of the Chancery Court, in this case, upon the averments of the bill, to impeach or review the decree of the same Court pronounced in another cause. Upon its face the present bill shows that the cause in which the decree was pronounced under which Nealis bought, was instituted by the State of Tennessee, for the use of the city of Memphis, against the complainant, Mrs. Reinhardt, as the owner of the lot in question, to enforce a lien for taxes thereon due to the city for the year 1893. There is no pretense that the complainant here was not regularly served with process in that case, or that the Chancery Court did not have jurisdiction to enforce this lien, unless it be that it was, by implication, deprived of this jurisdiction by the Act of 1895. There is no recital in the present bill from which it can be inferred that taxes for any other year than those due for the year 1893 were claimed, and especially there is no charge that anywhere in the record of that cause was it made to appear that any taxes were due upon the lot in question which

would call into operation Chapter 120 of the Acts of 1895. By Section 76 of that Act, it was enacted, "that on the first Monday in June, 1895, and each year thereafter, . . . the trustee shall deliver to attorneys, to be appointed by the State Comptroller, . . . certified statement of all taxes remaining delinquent . . . for the current year." Subsequent sections provide the methods to be pursued by the back tax attorney in collecting these delinquent taxes; but it is clear his power to act at all, under the provisions of this statute, depends upon the condition that a tax is "remaining delinquent" for the current year, of which he receives the annual statement from the County Trustee.

The preliminary objection made by the defendant, Nealis, which we regard as decisive of the present case, is, that this is a collateral attack upon a decree of a superior Court, and an effort to defeat its jurisdiction by showing a fact *dehors* the record. Upon the face of the record in that cause, as appears from the recital of the present bill, the Chancery Court had not only statutory, but inherent, jurisdiction to pronounce its decree for sale for the unpaid taxes of 1893, and it is now sought to defeat that jurisdiction by averring and proving in the present case that taxes were delinquent for the year 1895, thus putting in operation the remedy provided by Chapter 120 of Acts of 1895, which it is now insisted was exclusive.

It is a familiar principle that the judgment or

decree of a Court of general jurisdiction cannot be collaterally questioned, except for want of authority over the matter adjudicated upon (Freeman on Jury, Sec. 132), and this want of authority must be found in the record itself. In the absence of anything in the record to impeach the right of such a Court to determine the question involved, there is a conclusive presumption that it had such right. *Id.*

As is said in *Pratt* v. *Dow*, 56 Me., 81: "We concur fully in the doctrine of the numerous cases cited for plaintiff, where it is held that a domestic judgment of a Court of general jurisdiction, proceeding according to the course of the common law, cannot be impeached by the parties to it, where a want of jurisdiction is not apparent upon the record, while it remains neither annulled or reversed." And so it has been held to be "the settled law of this State, deemed indispensable to that sanctity of judicial proceedings necessary for the public welfare, that domestic judgments of Courts of general jurisdiction cannot be collaterally attacked by evidence outside of the record itself." *Harris* v. *McClanahan*, 11 Lea, 185. To like effect are *Robertson* v. *Winchester*, 1 Pickle, 187; *Hopper* v. *Fisher*, 2 Head, 256; *Kilcrease* v. *Blythe*, 6 Hum., 389; *Winchester* v. *Winchester*, 1 Head, 460.

Kindell v. *Titus*, 9 Heis., 727, was a bill filed to set aside as void a sale of real estate made by order of the County Court, under the Act of 1827, Ch. 54. While recognizing that the jurisdiction there

conferred was purely statutory and of a limited character, yet this Court applied this rule and said: "We hold, then, the true principle to be, that where the bill or petition alleges all the facts required by the statute in order to sell the land, and the decree states these facts to have been made out to the satisfaction of the Court, and assumes them as the basis and the ground on which the Court orders the sale, that then in a collateral proceeding, seeking to attack the sale for want of jurisdiction to make it, the evidence on which the Court acted cannot be looked to, nor can the correctness of the conclusion at which the Court arrived from the evidence, be investigated by another inferior Court, in order to declare the decree thus made valid or void. The case made in the pleadings—*i. e.*, the bill or petition and the decree of the Court—alone can be looked to to test the jurisdiction." And such is the regard entertained for the judgment of a Court of general jurisdiction, that even "though the existence of any jusisdictional fact may not be affirmed in the record, it will be presumed, upon a collateral attack, that the Court . . . has acted correctly and with due authority." *Pope* v. *Harrison*, 16 Lea, 82.

We think, on reason and authority, the insistence of complainant cannot be maintained, and that the Chancellor was right in dismissing complainant's bill. With regard to the suggestion of hardship, by reason of the assumed disparity between the value of the lot in controversy and the amount bid by Nealis for

it, it is proper to say that this is greatly modified by the fact that he will take it subject to all the taxes accrued against it later than those embraced in the decree of foreclosure under which he purchased.

Decree affirmed.

CARPENTER *v.* RICHARDSON.

(*Jackson.* June 1, 1898.)

1. BUILDING AND LOAN ASSOCIATIONS. *Method of adjustment between insolvent association and borrower.*

In a suit by the receiver of an insolvent building and loan association against its borrowing member, who had defaulted before the association became insolvent, to ascertain amount due and to foreclose the mortgage, the complainant is entitled to recover the amount loaned, with interest from date of loan, and unpaid premiums (but not fines), subject to credit for all cash amounts paid on interest, premiums, etc., with interest thereon. (*Post, pp. 177, 178.*)

Cases cited and approved: Rogers *v.* Hargo, 92 Tenn., 35; Post *v.* Building & Loan Association, 97 Tenn., 408.

2. SAME. *Borrowing member not entitled to credit for stock left with association, when.*

A member is not entitled to credit for value of stock left with a building and loan association as a premium upon his loan, in a suit prosecuted by a receiver of the association, after its insolvency, to foreclose the mortgage executed to secure the loan. (*Post, p. 179.*)

3. SAME. *Interest allowed against member after insolvency of association.*

In the absence of a proper tender by the borrowing member, a building and loan association can recover interest against him in a foreclosure suit, even if it accrued after the association's insolvency. (*Post, pp. 179, 180.*)

FROM SHELBY.

Appeal from Chancery Court of Shelby County. STERLING PIERSON, Ch.

Carpenter *v.* Richardson.

F. H. HEISKELL and TEMPLETON & CATES for Carpenter.

C. W. HEISKELL for Richardson.

WILKES, J. This is a bill to foreclose a mortgage made to a building and loan association, and to determine the amount of the mortgage debt. The association is insolvent, and the bill is filed by its receivers. The principal contest in this Court is over the amount of the debt and the basis on which it is to be determined and fixed. The Chancellor gave a decree for $450 and some interest and premium installments, amounting in all to $478, and ordered the mortgaged premises sold unless that sum was paid in thirty days. The association has appealed.

It appears that the particular scheme of this association was that the borrower should subscribe for $900 of stock, and execute notes, with mortgage, for that sum. Of this, however, she was to have the benefit of only $450 for herself, the other $450 being given to the association as a premium for a loan of $450. The borrower was to pay interest upon the $450 borrowed, and fines, dues, etc., on the $900 of stock, and the note was to be paid by maturing the whole stock. There was a demurrer filed in the cause. Six of the grounds of demurrer were to the effect that the scheme was illegal for want of competitive biddings. These grounds were

overruled, and from this part of the decree there was no appeal.

The seventh ground of demurrer was sustained, and the result was to determine that, in adjusting the amounts due from the borrowers, they should be charged with the sum actually received, and legal interest from the date the money was borrowed, July 25, 1895, and credited with the amount of premium and interest paid. The amount of premium paid is shown by the letter of the receivers to be $18.90, including interest. It seems that this amount is, or at least is treated, as cash dues paid on the $450 premium stock, which was to be matured for the company. It is insisted that it was error to simply charge the borrower with six per cent. interest on the amount actually received, and give her credit for premiums and interest paid, and interest thereon, inasmuch as the borrower was delinquent before the association became insolvent; also that it was error to allow credit for the dues paid on premium stock; and that it was error not to give a decree for fines imposed, in addition to the loan and interest.

The basis adopted by the Chancellor to fix the debt of the mortgagee in this case conforms, as near as may be, to the rule heretofore laid down by this Court, and is as near correct as the ever changing schemes of these companies will permit. *Rogers* v. *Hargo*, 8 Pickle, 35; *Post* v. *Association*, 13 Pickle, 408. What may be the rights of this, or any other stockholder, on the final adjustment of the affairs of

the association, in a case where all parties are before the Court, and all equities are to be adjusted, can only be determined at that time.

The premium in this case consists of the stock which the borrower was to mature for the benefit of the company, and such cash amounts as she was required to pay upon that stock in the way of dues, fines, etc. For this latter sum she is allowed credit by the Chancellor, the company stock remaining in the control of the company to await the final adjustment, but with no obligation on the borrower to make any further payments on it.

The borrower in this case insists she should have credit for the value of her stock upon her loan. But it is manifest the value of the stock cannot be ascertained, even approximately, until the affairs of the association are so far wound up as to furnish some basis or assurance of what may be left for the stockholders on final settlement. This will make a hardship upon borrowers, but it is unavoidable except so far as the Courts winding up the association may see their way clear, from time to time, to declare stock dividends, in which events the amounts declared in favor of a borrower might be credited upon his debt.

It is claimed that no interest should be allowed after insolvency, and especially in the present case, when the association was demanding, by settlement, more than it was entitled to. But the proper remedy for the borrower in such case was to tender

the amount due on a proper settlement, and stand upon the tender.

The decree of the Chancellor is affirmed, with costs, and the cause remanded for the execution of the decree of sale from the Court below, after such limit of time as that Court may direct, within which the amount due may be paid off.

TRADING STAMP CO. *v.* MEMPHIS.*

(*Jackson.* June 4, 1898.)

1. MUNICIPAL CORPORATIONS. *Enjoined from passing ordinance.*

A municipal corporation will be restrained from passing a clearly illegal and *ultra vires* ordinance, which, if permitted to go into effect, would, on account of its highly penal nature, and the number of persons affected, cause great confusion and mischief and multiplicity of suits before its validity could be tested. (*Post, pp. 182–186.*)

Cases cited: Bradley *v.* Commissioners, 2 Hum., 428; Lynn *v.* Polk, 8 Lea, 127; Public Ledger *v.* Memphis, 93 Tenn., 81; 26 L. R. A., 541; 44 Iowa, 505; 13 L. R. A., 844; 43 Fed. Rep., 308.

2. SAME. *No power to create privileges for taxation.*

A municipal corporation has not power to make an occupation a privilege and tax it, which has not been first named such by the Legislature. (*Post, p. 183.*)

Cases cited: Mayor *v.* Althrop, 5 Cold, 554; Fulghum *v.* Mayor, 8 Lea, 640.

3. SAME. *Power to create a privilege and tax it not conferred, when.*

Power to create a privilege and levy a tax on it is not conferred upon a municipal corporation by a statute permitting it to impose a tax on every object and subject of taxation within its limits, and providing that the power shall extend to every species of property, and to privileges and all other things upon which the Legislature or the city has heretofore laid taxes, rates, or assessments. (*Post, pp. 184, 185.*)

Act construed: Acts of 1893, Ch. 84.

4. CONSTITUTIONAL LAW. *Passage of statutes.*

A statute, though published with the legislative "Acts," is in-

*On the question of injunction to prevent the passage of a municipal ordinance the authorities are collected in a note to *Roberts* v. *Louisville* (Ky.), 13 L. R. A., 844. —REPORTER.

valid where it appears from the journals that it was vetoed by the Governor and never passed over the veto. (*Post, pp. 183, 184.*)

Acts construed: Acts 1898, Ch. —— (Ex. Sess.).

FROM SHELBY.

Appeal from Chancery Court of Shelby County. STERLING PIERSON, Ch.

CARROLL, CHALMERS & MCKELLAR and METCALF & WALKER for Trading Stamp Company.

JOHN H. WATKINS for City of Memphis.

WILKES, J. The complainant stamp company and certain merchants doing business in Memphis, filed this bill against the City Council and City of Memphis, seeking to enjoin the passage of an ordinance pending before the Council imposing a privilege tax upon the company of $500, and upon each merchant of $250, for engaging in what is styled the trading stamp business, and declaring the doing of such business without license a misdemeanor upon the part of the company and the merchants. An injunction was granted and served upon the members of the Council. The defendants moved to dissolve the injunction and also demurred to the bill on various grounds. The Chancellor overruled the demurrer and refused to dissolve the injunction. On motion the

penalty of the bond was increased to $10,000 and complainants declined to give it, and the injunction was dissolved.

From the decree overruling the demurrer the Chancellor granted an appeal to the defendants, and they have assigned errors. While the errors assigned are eight in number, only one question is presented, and that is whether a Court of Chancery should enjoin a City Council from passing such an ordinance under its legislative power.

It is conceded that a Court of Chancery may restrain the enforcement of an illegal or *ultra vires* ordinance after it is passed. *Bradley* v. *Commissioners*, 2 Hum., 428; *Lynn* v. *Polk*, 8 Lea, 127; *Public Ledger* v. *Memphis*, 93 Tenn., 81; *Dennis* v. *Baltimore*, 26 L. R. A., 541–543.

It is insisted this ordinance, if passed, would be *ultra vires* and void, because it attempts to create a privilege and tax it, and make its pursuit without payment of tax a misdemeanor, when the Legislature has not so provided. The contention is that the Legislature alone can create a privilege and authorize its taxation, and that a municipal corporation cannot make any occupation a privilege, nor impose a tax upon it, unless it has first been so declared by the Legislature. This we think is correct. *Mayor* v. *Althorp*, 5 Cold., 554, 558, 559; *Fulghum* v. *Mayor*, 8 Lea, 640.

It is insisted that the Legislature has not made the trading stamp business a privilege, nor imposed

a tax upon it, and an attempt to do so by the City Council of Memphis would be an act *ultra vires* and beyond its power, and that such action may be enjoined to prevent irreparable mischief and damage.

It appears that the Legislature, at its special session (1898), did pass a bill declaring that trading stamp agencies, and merchants doing business by or through such agencies, should pay a tax for such privilege, and the bill is published as an Act of the extra session of 1898. But it appears from the journal of the House that the bill was vetoed by the Governor as unconstitutional and was not passed over his veto, so that it has no force or vitality, and is improperly published as an existing law.

It is next contended, that, under Sec. 4, Ch. 84, of the Acts of 1893, the city of Memphis was empowered to levy privilege taxes, and hence the Legislative Council was acting within the scope of its authority. This section is as follows:

"SEC. 4. *Be it further enacted*, That from and including the year 1893, power is hereby conferred upon the Legislative Council of the city of Memphis to levy and impose all necessary taxes for the support of the government of said city. In the exercise of said power the Legislative Council shall always levy and impose a sufficient tax to pay the interest of the outstanding bonds of said city, and to provide a sinking fund for the retirement of the bonds themselves, as required by the law under which said bonds were issued. . . . The power conferred

thus to impose taxes shall apply to every object and subject of taxation within the corporate limits of the city of Memphis. Said power shall extend to every species of property and to privileges and wharfage dues, and all other things upon which the Legislature or the city has heretofore laid taxes, rates or assessments for the support and maintenance of said government, the object being to provide for the exercise of the power herein conferred under the restrictions named as fully as the same could be exercised if the Legislature and not the city were exercising the power."

It is evident that the power conferred by this Act was to tax such property, privileges, and other things, as had been theretofore taxed, or thereafter ordered to be taxed, by the Legislature or the city under the authority of the Legislature, but it did not confer the power to create new privileges and assess taxes for their exercise, and, as we have already seen, no such power exists independent of legislative authority.

It clearly appears, therefore, that the contemplated action of the council was illegal and *ultra vires*, and the question recurs, should complainants be allowed to enjoin the enactment of the ordinance, or take their remedy to prevent its enforcement after it is passed?

In the case of *Public Ledger Co.* v. *Memphis*, 9 Pickle, 81, this Court said: "The remedy by injunction to prevent municipal corporate

action is one not lightly to be applied. If the matter complained of is one merely of simple contract of no serious moment, and which may be defeated by resistance to its enforcement, even by the body making it, there is no sufficient ground for the use of the writ at the instance of the taxpayer."

But there is a broad distinction between the exercise of legislative authority when the power or jurisdiction to exercise it has been conferred by law, and an attempt to legislate upon matters clearly *ultra vires.* Where there is power and authority conferred by law to do any legislative act, the discretion of the council cannot be controlled, but when there is no legislative authority or power, injunction will lie. A municipal corporation has no discretion to do any act which is clearly illegal and beyond its power. *DesMoines Gas Co.* v. *DesMoines*, 44 Iowa, 505; *Roberts* v. *City of Louisville*, 13 L. R. A., 844; High on Injunc., Sec. 1241, and cases cited; *Negus* v. *Dwyer*, 90 N. Y., 402; *Memphis* v. *East Portland*, 43 Fed. Rep., 308.

It is said, however, conceding that injunction will lie, it should not be resorted to so long as the complainant has either sufficient remedies, such as an action for damages or an action to enjoin the enforcement of the ordinance when passed, and this is undoubtedly so.

The legislation proposed is to impose a tax of $500 upon the stamp company, and $250 on each

merchant using the stamps, and to make the violation of the ordinance a misdemeanor. It is alleged there are a number of these merchants, one hundred and forty-five or more; with these merchants the company has a contract for a year, which must be breached if the law is observed, and thus ground will be laid for a large number of suits. Moreover, the use of the stamps being made a misdemeanor, the merchants would each be liable in a criminal action if he did not break the contract. Each breach would perhaps be a separate, distinct offense, for which the penalty could be demanded, at least until the question was settled on appeal. To restrain the enforcement, an action would have to be brought by each person liable, so that we think a proper case is made out to enjoin the passage of the Act, and the decree of the Court below is affirmed with costs.

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JONES *v.* MEMPHIS.

(*Jackson.* June 11, 1898.)

1. CONSTITUTIONAL LAW. *Exemption of territory added to city from taxes.*

The constitutional requirement of equal and uniform taxation is violated by a statutory provision exempting, for a period of ten years, from taxation for current expenses and future wants, *e. g.*, police, fire, and lighting purposes, of new territory added to a city, at the same time leaving the old city liable to taxation for these purposes, although it further provides that the new territory shall not have, during said period, the benefit of police, fire, and light protection. This principle does not, however, forbid the protection of the new territory against taxation for the debt of the old city. (*Post, pp. 191–193.*)

Constitution construed: Art. II., §§ 28, 29.

Cases cited and approved: Taylor *v.* Chandler, 9 Heis., 366; Reelfoot, etc., Dist. *v.* Dawson, 97 Tenn., 151; Keezee *v.* Board, 6 Cold., 127.

2. SAME. *Discriminating statute.*

A statutory provision that withholds absolutely for the period of ten years from newly added territory the advantages of police, light, and fire protection enjoyed by the old city is unconstitutional, although it further provides that the new territory shall be exempt from taxation for these purposes during said period. (*Post, pp. 193, 194.*)

3. STATUTES. *Void in part, void in toto.*

A scheme for adding territory to a city, embodied in several statutes passed contemporaneously, providing, among other things, for sewers and waterworks, and which would not have been passed had a provision not been inserted exempting the added territory from taxation of a certain kind for a certain period, must go down if the provision for exemption is found to be unconstitutional. (*Post, pp. 194–196.*)

4. SAME. *General rule where they contain unconstitutional provisions.*

Where a single statute, or several statutes constituting one scheme, contain one or more unconstitutional provisions, the obnoxious provisions will be eliminated and the statute or scheme sustained as to the rest, unless the provisions are deemed so essential and are so interwoven with others, that it cannot be reasonably presumed that the Legislature intended the statute to operate otherwise than as a whole, and, in that event, the entire statute or scheme falls. (*Post*, *p.* 195.)

Cases cited: State *v.* Scott, 98 Tenn., 256; Reelfoot, etc., Dist. *v.* Dawson, 97 Tenn., 151; Tillman *v.* Cocke, 9 Bax., 429; 158 U. S., 601.

FROM SHELBY.

Appeal from Chancery Court of Shelby County. STERLING PIERSON, Ch.

CARROLL & MCKELLAR and W. W. MCDOWELL for Jones.

JNO. H. WATKINS and METCALF & WALKER for City of Memphis.

WILKES, J. This bill is brought to test the validity and constitutionality of certain Acts of the General Assembly of Tennessee, passed at its extra session, 1898. It is filed by a number of persons, some of whom are nonresidents of the State, but interested in the questions presented. Others reside in the territory annexed by the Acts to the city of Memphis, others own property therein, and still others do business within the limits, while the principal defendant, Mrs. Chas. Jones, owns what is styled

in the record a Flippin bond, and presents a question specially affecting her interests as well as that of others holding similar bonds.

The defendants are the city of Memphis, its Mayor, Vice Mayor, Fire and Police Commissioners, Board of Public Works, the Trustee of Shelby County and Collector of City Taxes, and the City Register, and the bill points out in detail the objections to the validity of the Acts.

There is a demurrer to the bill, setting out, under separate heads and subheads, grounds in support of the Acts and objections to the bill. This demurrer was acted upon in the Court below. The learned Chancellor was of opinion that Sections 3 and 4 of Chapter 6 of the Acts of the Extra Session of 1898 were unconstitutional and invalid, but that they could be eliminated from the Act, leaving the remaining portions valid and in force. He was also of opinion that the proposed action of the City Council in the issuance of bonds of the city, imposing a general liability upon the city for waterworks and sewerage purposes, was illegal, and so much of the Acts as authorized the issuance of such bonds was unconstitutional, as impairing the security of the Flippin bonds, but that such bonds could be issued with a limited liability, and with a lien upon the improvements added, according to the provisions of the Act.

Complainants and defendants have appealed, and the questions raised by the pleadings are before this Court for adjudication, and, owing to the magnitude

of the interests involved, and the importance of the questions raised to a large portion of the public, the cause has been advanced upon the docket for a speedy hearing and determination.

The first objection to the Acts is that they seek to impose a different rate of taxation upon the old and new territory within the same municipality, and the objection is based upon Sections 28 and 29 of Article II. of the Constitution of Tennessee.

By Section 28 it is provided: "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property upon which a tax may be collected shall be taxed higher than any other species of property of the same value."

By Section 29 it is provided: "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

The argument for complainants is that a State tax must be equal and uniform throughout the State; that a county tax must be equal and uniform throughout the county; and that a city tax must be equal and uniform throughout the city.

The Chancellor thought this proposition was well founded, basing his conclusion upon the language of the cases of *Taylor, McBean & Co.* v. *Chandler*, 9 Heis., 366, 367; and *Reelfoot Lake Levee District* v. *Dawson*, 13 Pickle, 151. He was, therefore, of opinion that the third and fourth sections of Chapter 6 of the Acts of the extra session were invalid, because they exempt the annexed territory from taxation for police, fire, and light purposes for a period of ten years, while during the same period, and for like purposes, the original territory is to be taxed, taxation for current purposes being thus made unequal in different parts of the same municipality. In this connection, also, attention is called to the fact that during this period the annexed portion is not to receive the benefit of police, fire, and light protection.

The learned Chancellor was of opinion there was a broad difference between providing for the debt of the old city, which could remain a tax upon that portion of the city alone which created it, and a new debt to be created upon the enlarged city, the argument being that, as to the latter, taxes must be equally laid upon every portion of the city, while as to the former, taxes might remain alone on the old city, and in this view he was clearly correct.

The Chancellor was, however, of opinion that the complainants could not successfully assail the entire Act, inasmuch as the objectionable sections relating to taxation and exemptions might be eliminated from

the Act, and the remaining sections might remain, which provide for the addition to the city, and relate to the liability for the original debt of the city—in other words, that by these sections the new territory might be brought into the city limits, but the unconstitutional method of taxation for current and future purposes might be declared invalid, without affecting the right to annex the territory.

This Court is of opinion that Sections 3 and 4 of Chapter 6 are clearly unconstitutional and void, inasmuch as they exempt the annexed territory from taxes for fire, light, and police protection for ten years, and for the same time expressly prohibit the district from having the advantages of this protection.

The Court is of opinion that taxation must always be uniform and equal throughout the extent of the same jurisdiction; that State taxes must be equal and uniform throughout the State; that county taxes must be equal and uniform throughout the county, and that a city tax must be equal and uniform throughout the city, so far as revenues for current expenses or future wants are concerned, and that this principle is fully sustained and illustrated in the cases of *Taylor, McBean & Co.* v. *Chandler*, 9 Heis., 366; *Reelfoot Lake* v. *Dawson*, 13 Pickle, 151; *Keezee* v. *Civil Dist. Board*, 6 Cold., 127, and a number of other cases.

So, also, if a portion of territory is annexed to and becomes a part of a city, it is entitled to all the benefits extended by the city to any other por-

tion, and while it may not, in all instances, be necessary to furnish at once the same advantages and conveniences to each and every locality in the city, still an Act which prescribes that it shall not have such advantages at all, or for a given time, is not valid, and cannot be sustained.

The logical result of the contrary holding as to taxation would be that in every city taxes might be different in different wards and on different streets; in every county taxes might be different in every civil district; in the State taxes might be different in every county and in each division—all clearly in violation of the Constitution and our whole theory of equal and uniform taxation. So, also, it cannot be maintained that a section of territory may be brought within the city limits, and made part of the city, and yet be excluded, by express enactment, from the benefits extended to other portions of the city. Fire, light, and police protection are necessary, to a greater or less extent, throughout the entire city, and cannot be excluded, by positive legislation, when the needs of the locality may demand and the funds of the city may warrant their supply. This being so, the question arises whether these sections may be eliminated and stricken out of the Act so as to leave the remainder of it valid and constitutional. It is evident that the different portions of this Act, as well as the several Acts passed in pursuance of the same general purpose, are parts and parcels of one general system and plan, and that

the whole legislation is so framed that each part is dependent upon the other and essential to it, and was an important element in its passage as a law.

The rule is, that when the provisions of an Act are so interdependent as to raise the presumption that the Legislature intended the Act to operate as a whole, and would not have enacted the valid provisions alone, the entire statute must be adjudged invalid. *State* v. *Scott*, 14 Pickle, 256; *Dawson* v. *Reelfoot Lake District*, 13 Pickle, 151; *Tillman* v. *Cocke*, 9 Bax., 429; *Pollock* v. *Farmers' Loan Co.*, 158 U. S., 601.

It is impossible to look at these several Acts and their provisions separately and as a whole, without concluding that the Legislature considered the matter as a whole, and thus acted upon it, and so intended the Acts to operate; and that it would not have passed the Acts if these invalid features had been omitted. The territory would not have been admitted but for the provisions of Sections 3 and 4, and the other Acts providing for sewers and waterworks would not have been passed if the territory had not been annexed. We cannot view these third and fourth sections but as important links in one chain, and if they had not been inserted, the whole scheme and plan must have failed. This being so, the entire Act, Chapter 6, must be held invalid, and along with it must go the other Acts, Chapters 13 and 14, providing for sewerage, waterworks, and the taxation of the annexed territory, as they are inter-

woven with and dependent on each other. Chapter 15, repealing the charter of Idlewild, is not involved in the pleadings of this case, and as to it we express no opinion. The result is that the entire Act, Chapter 6, and the other Acts, Chapters 13 and 14, dependent upon it, are declared unconstitutional and invalid, and of no effect, and this being a final disposition of this question upon its merits, the City Council is enjoined from putting the same into operation and effect, or issuing any bonds or collecting any tax, or making any additions or improvements thereunder.

The cause will be remanded to the Court below for such action as may be proper in regard to the refunding of taxes already paid, inasmuch as we do not consider that question properly before us in disposing of the case on demurrer. The city will pay the costs of the case. It is useless to pass upon the other questions raised, though they have been considered.

RAILROAD *v.* THOMPSON.

(*Jackson.* August 26, 1898.)

1. RAILROAD. *Nonobservance of statutory precautions.*

Nonobservance of statutory precautions for prevention of accidents does not render a railroad company liable for injury to an animal struck by its train, when, by reason of the sudden appearance of the animal upon or in dangerous proximity to the track. it became impossible for those in charge of the train, by the exercise of the greatest possible diligence, to observe the signals or prevent the collision. (*Post, pp. 199, 200.*)

Code construed: § 1574 (S.); § 1298 (M. & V.); § 1166 (T. & S.).

Cases cited and approved: Railroad *v.* Foster, 88 Tenn., 680; Railroad *v.* House, 96 Tenn., 555.

2. SAME. *Failure to fence track.*

The mere failure of a railroad company to fence its track at the crossing of a private way, the obstruction of which is forbidden and punished by statute, affords no ground for the company's liability for injury to an animal by collision with a train at such crossing, if the company was otherwise free from negligence. (*Post, pp. 200–205.*)

Acts construed: Acts 1891, Ch. 101; Acts 1879, Ch. 83.

Code construed: §§ 1587–88, 6869 (S.); § 5746 (M. & V.); § 4913 (T. & S.).

Cases cited and approved: Railroads *v.* Crider, 91 Tenn., 496; Railroad *v.* Russell, 92 Tenn., 110; Railroad *v.* Hughes, 94 Tenn., 450; Railroad *v.* House, 96 Tenn., 552.

3. STATUTES. *Repeal by implication.*

The statute requiring the fencing of railroad tracks is not to be construed as repealing the statute making it a misdemeanor to obstruct certain private ways. (*Post, pp. 200–205.*)

Acts construed: Acts 1879, Ch. 83; Acts 1891, Ch. 101.

FROM GIBSON.

Appeal in error from Circuit Court of Gibson County. JNO. R. BOND, J.

C. G. BOND and R. P. RAINES for Railroad.

W. S. COULTER for Thompson.

CALDWELL, J. W. W. Thompson brought this action against the Mobile & Ohio Railroad Company, to recover damages for injuries received by a mare in collision with one of the company's moving trains. The Circuit Judge, who heard the case without the intervention of a jury, rendered judgment in favor of Thompson for $30, and the railroad company appealed in error.

Though admitting the injury to the mare, the company denies that it is legally responsible for the damage done. The collision occurred on a private crossing, at the intersection of the company's track and a private road, about one mile north of the town of Dyer. W. A. Hearn owned the private road, and had used it for twenty-five or thirty years as a private way from his residence across the railroad track into a large uninclosed woods, and thence to a public road leading to town, school, mill, church, and graveyard. He owned the land on both sides of the railroad, and had no other open way of ingress and egress to and from his residence, which stands but a short distance west of the crossing. The land on each side of the track and on each side of the crossing for a greater or less distance was inclosed by the owner, cattle guards were erected by the railroad company across its track on each side of the crossing, and these

were attached to the owner's fences by suitable wings, so that live stock on the crossing could go neither up nor down the track from that point. The crossing itself was not inclosed on either side of the railroad. Hearn's fences on each side of the track diverged respectively to the right and to the left from the outer ends of the wings of the cattle guards, those on the east passing along one side of the large uninclosed woods, and those on the west connecting, one with the north and the other with the south end of his front yard fence, so as to inclose the space between his front yard and the railroad at all points, except at the crossing, which was not inclosed. Thompson had ridden the mare into this space, and dismounted at Hearn's front gate, near which he tied her to the fence, some fifty or seventy-five yards from the crossing. The noise of an approaching freight train frightened the animal, which was blind in one eye, and caused her to break loose and run rapidly to the crossing, where the collision took place. Thompson thinks the pilot struck her first, and then the tender. Hearn thinks "the engine struck her, or she struck the engine," near the engineer's seat, and was then knocked down by the tender or one of the cars; and the engineer says, "she struck the engine at the cab where" he sat, and in that way was injured.

There could be but one of two grounds of liability on the part of the railroad company—first, a failure to comply with statutory precautions for the pre-

vention of accidents; or, second, a failure to fence the crossing. It is conceded in the testimony of the railroad company that there was, in fact, a failure in both particulars, and yet it denies that it is liable, under the attending circumstances, on either ground.

In any and every view of the evidence, the animal's appearance upon the track, or in dangerous proximity to it, was, undoubtedly, so sudden that those in charge of the engine could not, thereafter, by the greatest possible diligence, have observed the precautions prescribed by the statute (Code, § 1166, Subsec. 4; M. & V., § 1298, Subsec. 4; Shannon, § 1574, Subsec. 4) for the prevention of accidents. This being so, the admitted nonobservance of those precautions affords no ground of liability on the part of the railroad company for the damages done. The law does not require impossibilities, nor impose penalties for not doing what could not have been done. The impossibility of observance in a case like that before the Court excuses from liability for nonobservance. *Railway Cos.* v. *Foster*, 88 Tenn., 680; *Railroad* v. *House*, 96 Tenn., 555. It follows that there is no ground of liability on the part of the railroad company in this case, unless a failure to fence its track at the crossing where the injury was inflicted renders it liable.

The statute as to fencing declares "that any person, company, or corporation, lessee or agent

thereof, owning or operating any railroad within the State of Tennessee, shall be liable for the value of any horse, cow, or other stock killed, and reasonable damages for any injury to any such live stock upon or near the track of any railroad in this State, whenever such killing or injury is caused by any moving train or engine or cars upon such track; *Provided*, That contributory negligence on the part of the plaintiff in any action or suit to recover damages for such killing or injury, may be set up as a defense," etc. Acts 1891, Ch. 101, Sec. 2 (Shannon's Code, § 1587). It also declares "that no person, company, or corporation owning or operating any railroad in this State, shall be liable, under the foregoing section of this Act, for any damage for the killing or injury of any such livestock when the track of said railroad is inclosed by a good and lawful fence, and good and sufficient cattle guards." *Ib.*, Sec. 3 (§ 1588).

This is known as the railroad fencing Act. Thereby, "the duty of fencing, and the resulting liability for failure to perform such duty, is imposed, not so much in the interest of the owners of the animals which may go upon an unfenced road, as in the interest of the general public who are concerned, that accidents shall be avoided and public travel be made as safe as the exigencies of that manner of transportation will permit." *Railroads* v. *Crider*, 91 Tenn., 496. "The object of the Act was to induce railroad companies to fence their

tracks, primarily in the interest of the traveling public, and, secondarily, for the protection of live stock along the line of travel. The second section makes railroad companies absolutely liable in damages for all live stock killed or injured by moving trains upon unfenced tracks, and Section 3 gives them complete exoneration from liability where their tracks are fenced." *Railroad* v. *Russell*, 92 Tenn., 110, 111.

Although the language is very general and comprehensive, and does not, in terms, except any part of any railroad track from the operation of the statute, it is manifest that the complete inclosure of every track, from one end to the other, by a continuous fence, would be wholly impracticable, and could not have been contemplated by the Legislature. Hence, it has been held that the statute does not apply to depots or stations, or to grounds immediately surrounding them, or to the crossings of public highways, or to portions of tracks that lie within towns or cities, and are intersected by public streets. *Railroad* v. *Hughes*, 94 Tenn., 450; *Railroad* v. *House*, 96 Tenn., 552.

A paramount public interest always intervenes at those places, and for that reason, fencing statutes, though in general terms, are uniformly construed as impliedly excepting them from their operation. Elliott on Railroads, Secs. 1193–1195; 7 Am. & Eng. Enc. L., pp. 910–912; Thornton on Railroad Fences, etc., Secs. 86 and 91. Besides the insuperable in-

tervention of public interest, which exists in all the States alike, there are statutes in this State which imperatively forbid the obstruction of certain ways by any one (Code, § 4913, Subsec. 4; M. & V., § 5746, Subsec. 4; Shannon, § 6869, Subsec. 4; Acts 1879, Ch. 83, Sec. 1), and for this additional reason, our Courts would hold such ways to be excluded by implication from the operation of the fencing statute. Private crossings are not affected with a public interest, and, therefore, they are generally held, in other States, not to be excepted from the requirements of fencing statutes. *Indianapolis* v. *Thomas*, 11 Am. & Eng. R. R. Cases, 491; *Pittsburg* v. *Cunnington*, 13 *Ib.*, 529; *Atchinson* v. *Shaft*, 19 *Ib.*, 529; *Omaha* v. *Sewrin*, 45 *Ib.*, 122.

In the States so holding, railroad companies are required to inclose private crossings by gates or bars, so as not to prevent owners from using them. 3 Elliott on Railroads, Sec. 1200.

This rule in respect of private crossings, which seems to prevail almost universally in other States, would be equally applicable in this State, and controlling in the present case, if the fencing statute stood alone and unaffected by other statutes, for here, as elsewhere, private crossings are maintained for private use, and not for the good of the public. But this statute must be considered and construed in connection with the prohibitory statutes previously mentioned. To include private crossings in the fencing statute is to run counter to those

other statutes, and impose a liability for a failure to do on the one hand what is prohibited on the other. By Sec. 1, Ch. 83, Acts 1879, it is made a misdemeanor for any person to obstruct public highways, private ways, streets, alleys, sidewalks, public grounds, commons, and ways leading to burying places, churches, schoolhouses, etc. Another statute declares it to be an indictable nuisance to obstruct public highways, private ways, etc., to burying grounds. Code, § 4913, Subsec. 4; M. & V., § 5746, Subsec. 4; Shannon, § 6869, Subsec. 4.

It cannot reasonably be assumed that the Legislature, in passing the fencing enactment, intended to impose on railroad companies any liability for failure to inclose, by gates or bars or otherwise, any crossing or place or part of their lines which, by those other statutes then existing, they were expressly prohibited from obstructing in any manner whatsoever, upon the penalty of punishment in the Criminal Courts of the State; nor can it be justly said that the necessary conflict is so great that the fencing statute impliedly repealed the others. Indeed, there is no actual conflict when the fencing statute is given its proper meaning—when made to apply only to those parts of the road against whose obstruction there was no previous prohibitory legislation. All of the enactments may stand together in full force and virtue, and operate harmoniously, when the fencing Act is given this construction, and

rightly held to be entirely inapplicable to those places embraced in the terms of the other Acts.

The crossing involved in this case is undoubtedly embraced in those terms, and, being so, is excluded from the operation of the fencing Act. The railroad company was not only under no legal obligation to fence this crossing, but was positively inhibited from doing so. Had it obstructed the owner's use by fence, gates, or bars, it would thereby have subjected itself to criminal prosecution under the prohibitory statutes mentioned, and the existence of the fencing statute would have been no defense; conviction would have been inevitable. From all of which it follows that the railroad company is not liable for the injury done to the plaintiff's mare.

The crossing on which she was injured, though a private one, is not within the provisions of the fencing Act, and, for that reason, a failure to fence is no ground for liability. Not having been brought within the provisions of the fencing Act, this crossing was left under the operation of the statute prescribing precautions for the prevention of accidents; but, as has been seen, the mare's appearance was so sudden as to render compliance with those precautions impossible, and, for that reason, the failure to comply with them affords no ground of liability.

The judgment below is reversed, and this Court, rendering the judgment that the trial Judge, sitting without a jury, should have rendered, adjudges the nonliability of the railroad company, and dismisses the plaintiff's suit at his cost.

SAUNDERS *v.* RAILROAD.

(*Jackson.* August 26, 1898.)

1. EJECTMENT. *Does not lie.*

A railroad company having, under its charter, the power to acquire a right of way by condemnation, gift, or purchase, cannot be ousted of its right of way acquired by the purchase of a railroad from another regularly created railroad company that had constructed and put the road in operation without paying for the land constituting the right of way. The landowner's remedy at law is provided by statute, and does not include ejectment. (*Post, pp. 207–210.*)

Code construed: §§ 1861, 1866 (S.); §§ 1566, 1571 (M. & V.); §§ 1342, 1347 (T. & S.).

Cases cited: Colcough *v.* Railroad, 2 Head, 172; Railroad *v.* Adams, 3 Head, 597; Railroad *v.* Cochrane, 3 Lea, 479; Parker *v.* Railroad, 13 Lea, 670.

2. CONSTITUTIONAL LAW. *Eminent domain.*

Under the constitutional provision that forbids the taking of private property for public use, without just compensation, it is not essential that the compensation shall precede the taking. It suffices that the statute authorizing the taking provides for due compensation and designates an impartial tribunal for its assessment. (*Post, pp. 208, 209.*)

Constitution construed: Art. I., Sec. 21.

Case cited and approved: Simms *v.* Railroad, 12 Heis., 621.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

MORGAN & MCFARLAND for Saunders.

TURLEY & WRIGHT for Railroad.

Saunders *v.* Railroad.

CALDWELL, J. This is an action of ejectment. The plaintiffs are the owners of a tract of land lying between the city of Memphis and the town of Raleigh, in Shelby County. The defendant, a regularly chartered railroad company, claims as owner and operates a steam commercial railroad between Memphis and Raleigh, its line of track passing over and through the tract of land owned by the plaintiffs. The right of way through this land was taken, and the road constructed and put in operation by the Raleigh Springs Railroad Company in 1891, such appropriation, so far as disclosed by this record, having been made without purchase, gift, or condemnation. That company became insolvent, and its property, including the right of way, was sold under decree of the Chancery Court, in June, 1894. J. T. Fargason became the purchaser, and, in August of the same year, sold it to the defendant, the Memphis & Raleigh Springs Railroad Company. The latter company went into immediate possession, and has operated the road continuously from that time to the present.

This action was commenced in June, 1896, to recover from the defendant the strip of ground on which the road is located through the land of the plaintiffs. The defendant pleaded not guilty, and the Judge, trying the case without the intervention of a jury, rendered a judgment dismissing the suit. The plaintiffs have appealed in error.

The judgment of the Court below is right. An

action of ejectment does not lie in such a case. By its charter the defendant was authorized to acquire a right of way by condemnation, gift, or purchase, and to construct and operate a railroad thereon. It purchased the right of way here in question, with the rest of the road, from one claiming to have acquired title through another regularly chartered railroad company, which had taken this particular right of way and others in the line and constructed a road upon them.

In this manner the defendant has come into the possession of the right of way through the land of plaintiffs in good faith, and is occupying and using it for the purpose contemplated by its charter. Such being true, that possession cannot be disturbed by an action of ejectment, thought the defendant's title be bad on account of the fact that the former company failed to acquire title to this right of way by condemnation or otherwise. At the most, the plaintiffs are entitled to compensation and damages only, and not to a recovery of the land.

Conceding that what previously transpired was ineffectual to divest the plaintiffs of their titles to this strip of ground, and, consequently, that the defendants acquired no title thereto by its purchase, the result of this litigation must be the same, for, in that event the defendant, under its charter and the general law, undoubtedly had plenary power to condemn the right of way for railroad purposes, and being now in possession and actually operating the

road, it cannot be ejected, though it has not, in fact, condemned the land and paid for it. It is true that the bill of rights (Const., Art I., Sec. 21) forbids the taking of private property for public use without just compensation, but this does not mean that compensation shall precede the taking. It suffices that the law authorizing the taking provides for the compensatoin and designates an impartial tribunal for its assessment. *Simms* v. *M., C. & L. R. R. Co.*, 12 Heis., 621.

Prior to the adoption of the Code of 1858, the remedy of the owner of land taken by a railroad company was confined to the provision of the charter. The remedy there given by the Legislature was exclusive. *Colcough* v. *N. & N. R. R. Co.*, 2 Head, 172; *Tenn. & Ala. R. R. Co.* v. *Adams*, 3 Head, 597. But since that time, by a provision originating with the Code, the landowner has more extended remedies. He not only has his former remedy of appeal in the condemnation proceedings instituted by the railroad company (Code, § 1342; M. & V., § 1566; Shannon, § 1861), but, in addition, if the company has actually taken possession of his land, and is occupying it for railroad purposes, without previous condemnation, the landowner may, upon his own petition, have "a jury of inquest" to assess his damages, "or may sue for damages in the ordinary way." Code, § 1347; M. & V. § 1571; Shannon, § 1866; *Railroad* v. *Cochrane*, 3 Lea, 479.

Thus the landowner's remedy was enlarged, but

that enlargement does not extend to or include an action in ejectment. Originally, his remedy was limited to that prescribed in the charter; now it is limited to that plus those added by the Code. As the original remedy was exclusive, so that and those added to it are now exclusive. They do not include an action in ejectment, hence, such an action is excluded. The landowner now has the right of appeal in the railroad company's condemnation proceedings, if it institutes them, and if it occupy his land without condemnation, he may have a jury of view, or an ordinary action of damages, at his election. He has no other remedies in a Court of Law; these are exclusive in that Court. If, for any sufficient reason, these legal remedies are embarrassed, and cannot be made available in a Court of Law, the landowner may, in a proper case, have appropriate redress through a bill in equity. *Parker* v. *Railway Co.*, 13 Lea, 670. We are aware that the Courts of last resort in many of the States hold that ejectment will lie, but in view of our statute it is not so in this State.

Affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1898.

STATE *v.* WILBUR

AND

WALKER *v.* HENDERSON.

(*Knoxville.* September 25, 1898.)

1. CRIMINAL COSTS. *Clerk's fees.*

   The Clerk is not entitled to a fee of twenty-five cents, or to any other fee, for certifying a bill of costs in a criminal case for payment by the State or county. (*Post, p. 215.*)

   Code construed: §§ 6398, 7594 (S.); §§ 5310, 6443 (M. & V.); §§ 4560, 5570 (T. & S.).

   Case cited and approved: Perkins *v.* State, 9 Bax., 3.

State *v.* Wilbur and Walker *v* Henderson.

2. SAME. *Same.*

The Clerk is not entitled to a fee of ten cents per one hundred words for copying bills of cost in criminal cases upon the record, preliminary to their adjudication against the State or county, there being no statute requiring this to be done. (*Post, pp. 215, 216.*)

Code construed: §§ 5301, 6442 (S.); §§ 4282, 5352 (M. & V.); §§ 3541, 4601 (T. & S.).

Case cited and approved: State *v.* Henderson, 15 Lea, 277.

3. MANDAMUS. *Not granted against County Judge, when.*

The Courts will not compel a County Judge, by mandamus, to issue warrant for criminal costs, though duly certified by the Judge and District Attorney-general, where there is no statute justifying the allowance of such costs. (*Post, pp. 218–221.*)

Code construed: § 673 (S.); § 586 (M. & V.); § 528 (T. & S.).

Cases cited: State, *ex rel.*, *v.* Puckett, 7 Lea, 709; Morgan *v.* Pickard, 86 Tenn., 208; Harris *v.* State, 96 Tenn., 517.

Question reserved: Whether Acts 1891, Ch. 22 (Ex. Sess.), was passed without the matter sufficiently embraced in a call for an extra session.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

C. R. EVANS and COOKE, SWANEY & COOKE for Walker and Hamilton County.

TREWHITT & STANFIELD for Henderson.

MCALISTER, J. These causes present questions in respect of costs claimed by the Circuit Court Clerk of Hamilton County. It appears from the record that the County Judge, Hon. Seth M. Walker, had

refused to audit these bills of costs, and thereupon, the relator, R. B. Henderson, commenced proceedings by mandamus to compel the County Judge to issue his warrant on the County Trustee for their payment. The bill of costs presented to the County Judge for payment amounted to $1,292. The particular items of costs objected to by the County Judge were, first, a fee of thirty-five cents for entering bills of costs of record, and, second, a fee of twenty-five cents for certifying bills of costs. It should be remarked that the cases in which these fees are alleged to have accrued originated before Justices of the Peace, where defendants had either submitted their cases under the small offense law, or, upon examination, had been discharged by the Justice. In such cases, when the costs were not paid by the defendant, it was the duty of the Justice to certify the same to the Circuit Court, where they were examined by the Circuit Judge and Attorney-general, and, if found correct, judgment allowing same was entered upon the minutes of the Court. It was insisted by the County Judge, there was no statute allowing the Clerk a fee of thirty-five cents for entering these bills of costs of record and a fee of twenty-five cents for certifying same. It was further insisted, that, as a matter of fact, said bills of costs had not been entered of record nor certified, and hence, no services had been performed for which said fees were charged.

The Circuit Judge heard the cause upon petition

and answer, together with the exhibits thereto, upon consideration whereof he awarded a peremptory writ of mandamus commanding the County Judge to issue his warrant upon the County Trustee for said costs.

The judgment of the Circuit Court further recites it was admitted at the bar that the relator had obtained a judgment for these bills of costs in said Circuit Court at the May term, 1895, but, by mistake, the Clerk failed to enter said judgment and the bills of costs upon the record, and, at the present term, upon motion and notice to defendant, Walker, which was not resisted, the judgment then rendered was entered *nunc pro tunc.*

The Circuit Judge was further of opinion that Ch. 22, Acts of Extra Session, 1891, Sec. 5, is unconstitutional. That Act empowers the Comptroller of the State and the County Judge, after the bills of costs have been examined and approved by the Circuit Judge and Attorney-general, to examine, inspect, and audit them, and to disallow any bills of costs wrongfully or illegally taxed against the State or county. The Circuit Judge was of opinion this Act was not within the scope of the call of the Governor convening the General Assembly in extraordinary session, and therefore, void. It is stated that the Court in this proceeding refused to adjudge the legality or illegality of the two items charged in these cost bills, but based his judgment exclusively upon the unconstitutionality of the Act of 1891, authorizing the County Judge to review and disallow bills of

costs after they have been certified by the Judge and Attorney-general.

Our first inquiry shall be in respect of the legality of the two items of cost in controversy. The principle is axiomatic, and in this State is embodied in a statute, that no officer is allowed to demand or receive fees or other compensation for any service further than is expressly provided by law. Shannon's Code, § 6352.

In respect of the item of twenty-five cents for certifying bills of cost, we find no law authorizing such a charge. On the contrary, it has been expressly decided by this Court, in *Perkins* v. *State*, 9 Bax., 3, that such fee is not authorized. In that case it was held that while (by § 7594 Shannon's Code) the Clerk is required to certify a copy of the judgment and bill of costs, with the certificate of the Attorney-general and Judge, there is no allowance to him for making said certificate. The fee allowed for every "certified copy of order," under § 6398, Subsec. 5, Shannon's Code, does not authorize the charge. The Clerk's certificate is in no sense a "copy of any order."

It is next assigned as error, that the Court erred in not striking out the fee of thirty-five cents for entering bill of costs of record. This assignment of error is well taken, since the question presented has already been adjudicated by the Court.

In the case of *State* v. *Henderson*, 15 Lea, 277, this Court held, viz., the only other exception taken

to the action of his Honor by the Attorney-general, is to the allowance of ten cents per hundred words for copying bills of cost on the record or minutes of the Court. In support of the ruling by his Honor we are referred to § 5301, Subsec. 35, and § 6442, M. & V. By Subsec. 35 of § 5301 the Clerk, "for copies of any pleadings, papers, and proceedings in a cause, is entitled, per hundred words, to ten cents from the person to whom or for whom they are furnished." But there is no statute requiring him to copy a bill of costs upon the minutes of the Court before judgment that county or State shall pay them.

It is insisted, however, that the County Judge could not lawfully refuse to issue his warrant for these costs after they had been allowed and certified by the Attorney-general and Judge, and that the Act of 1891, authorizing the State Comptroller, Judge, or Chairman of the County Court to examine and disallow any part of a bill of costs illegally taxed against the State or county, although the same may have been approved by the Circuit Judge and Attorney-general, is unconstitutional and void. The objections to this Act are two-fold, to wit: (1) The Legislature does not establish a new Court, but attempts to give superior authority to the Judge of a County Court, and takes from the Appellate Court the rights properly belonging to it. It is insisted this Act violates Art 6, Sec. 1, Constitution of Tennessee, which provides, viz.: "The judicial power of

this State shall be vested in one Supreme Court, and in such circuit, chancery, and other inferior Courts, as the Legislature shall, from time to time, ordain and establish." (2) That said Act is unconstitutional because the legislation attempted is not contemplated or called for in the proclamation convening the General Assembly in extraordinary session. Art. 3, Sec. 9, Constitution of Tennessee, in enumerating the powers of the Governor, provides, viz.: "He may, on extraordinary occasions, convene the General Assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specially called together."

The proclamation of the Governor convening the Forty-seventh General Assembly in extra session, after enumerating certain specific purposes of the call, embodies the following: "3. To pass statutes to modify, annul, or add to the system of criminal laws and procedure in this State." In pursuance of this call the Legislature assembled, and, among other statutes, passed the one now in controversy. That Act is entitled, "An Act to amend §§ 5586, 5587 of the Code of 1858, relative to the payment of costs in criminal cases, and to more clearly define what costs in criminal cases the State and county will be held liable."

The fifth section of that Act is, viz., "that the State Comptroller, Judge or Chairman of County Court, after said bills have been examined and ap-

proved by the Judge and Attorney-general, are hereby granted full power, and it is hereby made their duty to examine into, inspect, and audit all bills of cost accruing against the State or county, and disallow any part of said bills of cost that may be illegal or wrongfully taxed against the State or county, and the State Comptroller, Judge or Chairman of the County Court may disallow any or all costs taxed against the State or county on account of malicious, frivolous, or unnecessary prosecutions, in the event the Attorney-general and Judge should be mistaken or otherwise approve of any such bills." This legislation will at once commend itself as eminently wise and wholesome. It had been held by this Court in *State, ex rel. Sharpe*, v. *Puckett, County Judge*, 7 Lea 709, that the County Judge had no authority to revise a bill of costs properly adjudged against the county, taxed, examined, and certified according to law.

The power to examine and adjust bills of costs was conferred by statute upon the Comptroller, prior to the passage of the Act of 1891, and if it appeared judgment had been rendered against the State for costs for which it was not liable, the Comptroller might refuse to draw his warrant. *Morgan* v. *Pickard*, 2 Pickle, 208. But the question now is whether the statute conferring this power upon the County Judge is constitutional. It is argued that the first sentence, namely, "(3) To pass statutes to modify, amend, or add to the system of

criminal laws and procedure in this State," is limited by the sentence immediately following and embraced within the same section, namely, "The passage of laws prohibiting the use of scrip, or its equivalent, by persons or corporations in payment of their debts, providing penalty for violation of same, and laws that will punish with penalties any interference with State convicts, will be commended to the attention of the Legislature under this general head." It is insisted that the power of the Legislature, under the call "to modify, amend, or add to the system of criminal laws and procedure," extends only to the specific matters set out in the second paragraph of the section. It is further insisted that the first sentence of this section, when considered alone, is not in conformity with the constitutional requirement, for the reason it does not state specifically the objects for which the Legislature is to be assembled, but that the specific purposes of the call, as required by the Constitution, are pointed out in the second clause, and hence, the scope of the first clause is circumscribed by the specifications of the second paragraph. However, we pretermit the decision of this question, since it is not necessarily required in the disposition of this case. It affirmatively appears that at least two items in the bill of costs now sought to be enforced by mandamus, are illegal, and this remedy will not be allowed for the enforcement of an illegal demand.

Says Mr. High: "The right of mandamus being

justly regarded as one of the highest rights known to our system of jurisprudence, it issues only when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases. The person seeking the relief must show a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced. The writ, if granted, must also be effectual as a remedy, and must be within the power of the respondent, as well as his duty, to do the act in question. It follows, also, from the important position which this writ occupies as a remedial process, as well as from its nature as an extraordinary remedy, that the exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the Court, subject always to well settled principles which have been established by the Courts or fixed by legislative enactment. Causes may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the proper remedy, but where the Court may, in the exercise of a judicial discrimination, still refuse the relief." High on Extraordinary Legal Remedies (3d Ed.), Sec. 39; *Harris* v. *State, ex rel.*, 96 Tenn., 517.

It results that the judgment of the Circuit Court

will be reversed, and the petition for the alternative writ of mandamus will be dismissed.

The other cases involved the same items of costs, and were motions made by the County Judge in the Circuit Court to retax, under § 673, Shannon's Code, viz.: "If the Judge or Chairman of the County Court, when a bill of costs thus authenticated (by Attorney-general and Circuit Judge) is presented to him, and his warrant for payment of same is demanded, conceive that said costs or any part of it is not lawfully chargeable to the county, he may defer the issuance of his warrant until he has moved the Court for a correction of the taxation." The Circuit Judge sustained the motion to retax as to the item of twenty-five cents for certifying bill of costs, but allowed the fee of thirty-five cents. The item of thirty-five cents is a charge for entering bill of cost on the minutes, and as there are three hundred and fifty words in each bill of costs the charge is thirty-five cents. Both sides appealed from the ruling of the Circuit Judge. The judgment of the Circuit Judge in allowing the charge of thirty-five cents for entering bills of cost of record is reversed, but in disallowing the item of twenty-five cents for certifying bills of cost his judgment is affirmed.

HAMILTON COUNTY *v.* RAPE.

(*Knoxville.* September 27, 1898.)

1. PUBLIC ROADS. *Rights of the public and of the abutting owner defined.*

The owner of a lot abutting on a public road or street is presumed, in the absence of something to indicate the contrary, to be owner of the fee to the center of the street or road, and the public easement in the land covered by the right of way is limited to street and road purposes only. (*Post, pp. 224, 225.*)

2. SAME. *Abutting owner entitled to compensation, when.*

The owner of a lot abutting upon a street or road, whose title to the fee extends to the center of the street, has a right of ingress and egress to and from his property, the destruction or impairment of which by the county, by changing the grade of the street or road, is a taking of property for public purposes, entitling him to compensation. (*Post, pp. 225–227.*)

Cases cited and approved: Anderson *v.* Turbeville, 6 Cold., 158; Railroad *v.* Bingham, 87 Tenn., 526; Gray *v.* Knoxville, 85 Tenn., 101; 18 L. R. A., 166.

Cited and distinguished: Humes *v.* Knoxville, 1 Hum., 403; Railroad *v.* Adams, 3 Head, 596.

3. DEED. *Calling for street.*

The statement in a deed conveying lots by numbers, that they adjoin and front on the west side of an avenue, does not imply that the grantee's line stops at the margin of the street, and does not extend to the center. (*Post, p. 227.*)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

C. R. EVANS and COOKE, SWANEY & COOKE for Hamilton County.

T. C. LATIMORE for Rape.

WILKES, J. This is an action against the county of Hamilton by one of its citizens. There was a trial before the Court and jury in the Court below, and a judgment against the county for $650, and the county has appealed and assigned errors.

Plaintiff, Rape, owns five lots in Hamilton County, in one of the unincorporated suburbs of Chattanooga. This property, with other lands, originally belonged to C. E. James. It was divided up by him into lots and streets, and a plat was registered of the property as thus divided and appropriated. The streets were partially graded, and the one in front of the property in controversy was cut down some two to three feet below the level of the abutting lots. In this condition the road was used by the public from about 1891 to 1895, when the county of Hamilton took control of the roadway as a public or county road, and cut down the grade of the road in front of the property from three to seven feet. The theory of this action is that in so doing the county impaired the means of access, or ingress and egress, to the lots on the front. These lots were improved with residences, the yards running down to the roadway, but a strip of some three feet was left on the margin as a pavement in front of the lots, outside the inclosures. Pedestrians could

reach and enter the front of these lots from the ends of this sidewalk, but neither footmen nor animals could reach the lots on their front without going up an embankment some five to seven feet high. There is a way by which the lots can be reached on their rear, both by footmen and vehicles.

The Court charged the jury that if the plaintiff owned these lots, and a street, avenue, or road had been dedicated to public use by the former owners about 1891, and the defendant county, in 1895, so changed the grade of this road that it destroyed or impaired the egress and ingress from the roadway to and from plaintiff's property, the plaintiff would be entitled to recover whatever damages the proof shows he has sustained in the matter. This charge fairly presents the only real question in controversy in the case.

It is insisted on behalf of the county that the action is virtually for a supposed tort, and that such action will not lie against a county for the management, etc., of its highways. Elliott on Roads and Streets, p. 323. On the other hand, it is insisted that this action is not for a tort, but is for the taking of property of an individual for public use without compensation.

It is argued for the county that when a street is laid out by an owner, and lots platted with reference thereto, and such plat of street and lots is registered, it is a dedication of the street to the public, and vests the fee simple title to the street

in the public, and abutting owners have no further interest in it than other citizens, and numerous authorities from other States are cited to sustain this proposition. See 9 Am. & Eng. Enc. L., 374, and note.

Whatever may be the law of other States, or where there is a statutory dedication, we do not think such is the law generally, nor of this State, and, unless there is something to indicate to the contrary, the abutting lot owners own the fee to the center of the street, and the public has an easement for road or street purposes only so long as it is used for such purposes. The argument, therefore, that when the county changed the grade of the road it was only dealing with its own property, in which the abutting owner had only the right of other citizens, is not sound. The abbutting lot owner is presumed to own to the center of the street. Elliott on Roads and Streets, p. 519. He has a right of ingress and egress to his property—or, as it is called, an easement of access—and if this is taken away, or if it is impaired or incumbered without his consent, it is a taking of his property for public purposes, for which he is entitled to compensation. Elliott on Roads and Streets, pp. 526, 161; *Anderson* v. *Turbeville*, 6 Cold., 158; *Railroad* v. *Bingham*, 3 Pick., 526.

This right of ingress and egress may be valuable or not, and may be of more or less value, according to the location of the property. Thus, in the

country districts, when a grade is changed through a man's farm, the right of ingress and egress may, at any particular point, be of little or no value, and for it the abutting owner would be entitled to little or no damages; but, in case of suburban property, a way of ingress and egress to the front of every lot is a matter of importance, and the destruction or impairment of such way is a proper matter for compensation to the extent of the value of the right thus taken away. It is not a question of tort under the pleadings, but of taking a valuable property right without compensation, and the charge is not erroneous. *Gray and Wife* v. *Knoxville*, 1 Pickle, 101; *Railroad* v. *Bingham*, 3 Pickle, 526.

The case of *Humes* v. *Knoxville*, 1 Hum., 403, may seem to be in apparent conflict with this holding, but in that case the action was for a tort, and the questions of taking property and the consequent right to compensation were not considered. So, likewise, in the case of the *Tenn. & Ala. R. R. Co.* v. *E. W. Adams*, 3 Head, 596–600, the action was for a tort, and the distinction between the actions for tort for injuries to real estate and for compensation for its taking, was considered and plainly drawn.

This action is for compensation, and does not proceed upon the idea of a tort, as was done in the two cases above cited. This view accords with our recent statutes relating to the establishing of streets,

and changing and altering grades of the same, by municipal corporations (Shannon, §§ 1985–1988), and is in harmony with the modern trend of judicial opinion as to what constitutes a taking, and what property may be made the subject of a taking. *M. & C. R. R.* v. *B. S. A. T. R. R.*, 18 L. R. A., 166.

It is said, however, that the deed to the plaintiff only gave him a right to the margin of the road. The deed conveys the lots by numbers, and says they adjoin and front each fifty feet on west side of Central Avenue, and extend westwardly to Grand Avenue. The descriptive term, west side of Central Auenue, does not mean that the line is the margin of Central Avenue, but simply that the lots lie on the western side or direction from Central Avenue. It does not expressly provide, nor does it at all imply, that the plaintiff's line stops at the margin of the street.

It is said the damages are excessive, and that, in any event, they should not exceed $369. This was a matter for the jury. It appears that ingress and egress was cut off almost entirely on the front of the lots; that the cutting down of the grade caused the banks to cave in and the fence to fall, so that it had to be moved back and reset; it uncovered the water pipes, and caused a pond of water to settle on the lots. The estimate as to the market value of the lots before and after the change ranged from $1,000 to $2,000. The remedies sug-

gested by the county as to terracing and erection of steps and building a retaining wall, which might have been done at a cost of from $300 to $369, would not put the party in the same condition, as to his property, as before the grade was cut.

We see no error in the record, and the judgment of the Court below is affirmed with costs.

HENDERSON *v.* WALKER.

(*Knoxville.* September 28, 1898.)

1. CRIMINAL COSTS. *Retaxation and correction of.*

A motion lies in the name of the county and County Judge to retax and correct bills of costs in criminal cases improperly taxed and certified against the county by the Criminal Judge and District Attorney, and the Judge or Chairman of the County Court may defer issuance of warrants therefor until retaxation can be had. (*Post, pp. 230–233.*)

Codes construed: §§ 495, 673, 4954 (S.); §§ 461, 586, 395 (M. & V.); §§ 528, 3212 (T. & S.).

2. SAME. *In habeas corpus cases.*

In habeas corpus cases, where the costs are not adjudged otherwise than against the State or county, the State must pay the costs when the charge is a felony, and the county when it is a misdemeanor. This method prescribed by the Code is not changed by Acts 1891, Ch. 22, prescribing a different rule as between State and county for payment of costs in criminal cases. (*Post, pp. 232, 233.*)

Act construed: Acts 1891, Ch. 22.

Code construed: §§ 7619–7621, 7022, 5542–5545 (S.); §§ 6465–6467, 5888, 4512–4515 (M. & V.); §§ 5585–5587, 5063, 3762–3765 (T. & S.).

Case cited: Stout *v.* State, 91 Tenn., 405.

3. SAME. *Same.*

The following fees should be taxed on behalf of the Clerk where costs are adjudged against the State or county in a *habeas corpus* case, to wit: 1. Filing petition, 25 cents; 2. For taking and filing affidavit to petition, 25 cents; 3. For issuing writ, 75 cents; 4. For bill costs, 50 cents; 5. For transcript to County Judge, 25 cents. (*Post, pp. 233, 234.*)

Code construed: §§ 6388, 5543. 5540 (S.); §§ 5301, 4513, 4510 (M. & V.); §§ 4551, 3763, 3760 (T. & S.).

4. SAME. *Same.*

The following fees should not be taxed on behalf of the Clerk where costs are adjudged against the State or county in *habeas corpus* cases, to wit: 1. For judgment, 75 cents; 2. For order to certify, 25 cents; 3. For certificate, 25 cents; 4. For seal, 50 cents. (*Post*, *pp.* 233, 234.)

Code construed: §§ 7595, 6388 (S.); §§ 6444, 5301 (M. & V.); §§ 5570*a*, 4551 (T. & S.).

Cases cited: Avery *v.* State, 7 Bax., 328; Perkins *v.* State, 9 Bax., 3.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

TREWHITT & STANFIELD and M. H. CLIFT for Henderson.

C. R. EVANS and COOKE, SWANEY & COOKE for Walker.

WILKES, J. These cases are motions to retax costs, made by the County Judge of Hamilton County, and counter motions to strike the motions to retax from the files. The cases are test causes, brought to try the right to costs in a large number of cases involving considerable amounts. The matters, as presented to the Court, arise on *habeas corpus* proceedings, and may be divided into three classes: (1) Cases where the trial Judge held the party legally restrained of his liberty, and taxed

the county with the costs; (2) when the trial Judge held the party not legally restrained, but entitled to discharge, and taxed the county with costs; (3) when the trial Judge held the party legally restrained, but reduced the bonds, and taxed the county with costs.

It appears that these cases have been heard and acted on at chambers, from time to time, from 1890 to 1896, the trial Judge, on the hearing, making a memorandum upon the papers at the time of trial, and ordering the costs taxed and certified for payment to the County Judge at that time. In 1896 entries were made in open Court, and formal judgments entered according to these memoranda. The County Judge refused to recognize the liability of the county for the costs, and refused to issue his warrant for the same until he could move the Circuit Court to retax the costs. He has made such motions, and the Clerk of the Circuit Court, by whom said costs are claimed, has moved to strike the motions from the files.

It is insisted that the motion to retax is made too late, inasmuch as the costs have been certified by the Judge and Attorney-general, which, it is insisted, has the force of a judgment final. The statute (Shannon, Sec. 673; Code 1858, Sec. 528) provides: "If the Judge or Chairman of the County Court, when a bill of costs (thus) authenticated is presented to him, and his warrant for the payment of the same is demanded, conceive that said costs,

or any part of it, is not lawfully chargeable to the county, he may defer the issuance of his warrant until he has moved the Court for a correction."

The warrant is demanded in these cases under and by virtue of the judgments entered at September term, 1896. The motions to retax were made by the County Judge June, 1897.

In many of the cases involved, the charge on which the prisoner was held was a felony. In such cases, where the petitioner is illegally held, and therefore discharged, the county should not pay the costs, and the motion to retax is sustained. Shannon, § 5543. In felony cases, where the petitioner was held as being legally in custody, the same rule must prevail. Shannon, §§ 5542–5545.

It is true that § 5542 gives the trial Judge discretion to tax the costs as he may think right, but this means according to the general provisions and analogies of the law between the petitioner on the one hand and State and county on the other. This section provides that the costs shall be taxed and collected as in other cases. Under the provisions of the statutes in other cases, the State pays the costs of prosecuting felonies unless they are taxed to the defendant, under § 5542, and the county pays such costs in misdemeanor cases. This is the general rule underlying the taxation of costs in felony and misdemeanor cases. It follows, in accordance with this general rule, that in felony cases, when the petitioners are illegally held and discharged,

or the bond reduced on the petition, the State should pay the costs; in misdemeanor cases, under like conditions, the county should pay them in so far as they are properly taxed. Nor is this rule affected by the provision of the Act of the extra session of 1891, brought into Shannon's compilation as § 7619, *et sequitur*, inasmuch as the Act has no application to this case. By that Act counties are required to pay costs in felony cases in four instances only—(1) when *nolle prosequi* is entered, (2) when the grand jury ignores the indictment, (3) when the case is retried, (4) when the case is dismissed by a Justice of the Peace on preliminary trial. Shannon, §§ 7619–7621, also § 7022; *Stout* v. *State*, 7 Pickle, 405, and note. We need not, therefore, consider this Act any further.

Specific items of cost are also brought in question in the following cases:

1. The cost of filing the petition, 25 cents. This is properly taxable. Shannon, §§ 5540, 6388, Subsec. 7.

2. For taking and filing affidavit to petition, 25 cents. This is a proper item of cost. Shannon, § 6388, Subsec. 8.

3. For issuing writ, 75 cents. This is a proper item. Shannon, § 6388, Subsec. 1.

4. Judgment, 75 cents. This is not a proper item. The Judge himself indorses the judgment on the papers, both the result of the case and the costs. The Clerk makes a memorandum of it on his

execution docket, but this memorandum on the execution docket is not a judgment for which he is entitled to costs of 75 cents.

5. Bill of costs, 50 cents. This is proper. Shannon's compilation, §§ 5540, 6388, Subsec. 48.

6. Order to certify, 25 cents. This is not a proper item. *Avery* v. *State*, 7 Bax., 328. It is not an order, or motion and order thereon, under § 6388, Subsec. 10, for no such order or motion was made at the time.

7. Certificate, 25 cents. This is not a proper item. *Perkins* v. *State*, 9 Bax., 3.

8. Transcript to County Judge, 25 cents. This is a proper item. §§ 5540, 5543.

9. Seal, 50 cents. This is not proper. Shannon, § 7595.

The motions are properly made in the name of the county and Judge of the County Court representing the county. Shannon, §§ 673, 4954. This is not a case which falls under the provisions of the statute. Shannon, § 495. The judgments of November 14, 1896, are irregular. They purport to be rendered upon proceedings had many years before, in 1891, at chambers. No bills of cost were then certified by the Circuit Judge and delivered to the County Judge, as the law provides. Shannon, § 5545. The so-called judgments were not rendered in cases at the time before the Court, either at chambers or otherwise, but on petitions disposed of at chambers from one to five years before that time. The

bills were not certified to by the person who was then District Attorney, but by his successor, who could have no personal knowledge of the cases. It is not intended to hold that a successor, in proper cases, may not certify.

The result is that the judgment of the Court below is affirmed, with costs against the appellant.

DONALDSON *v.* WALKER.

(*Knoxville.* September 28, 1898.)

1. CRIMINAL COSTS. *District Attorneys' fees.*

A District Attorney is entitled to no fee where a misdemeanor case is dismissed by *nolle prosequi*, and the State's costs adjudged against the county. (*Post, p. 241.*)

Code construed: §§ 6380, 6383 (S.); §§ 5293, 5296 (M. & V.); §§ 4545*a*, 4548 (T. & S.).

Case cited: State *v.* Farris, 4 Lea, 183.

2. SAME. *Payment suspended by County Judge.*

Where a County Judge has inadvertently or erroneously issued a county warrant for costs of a criminal case illegally taxed and certified against the county, he may, under the Code, without the aid of Acts 1891, Ch. 22, forbid and suspend payment of the warrant in the hands of the original holder, and perhaps in the hands of others, until it can be purged, by retaxation of the costs, of all illegal and unauthorized items. (*Post, pp. 241–243.*)

Code construed: §§ 672, 673 (S.); §§ 585, 586 (M. & V.); §§ 527, 528 (T. & S.).

Question reserved: Constitutionality of Acts 1891, Ch. 22.

Case cited: Morgan *v.* Pickard, 86 Tenn., 211.

3. SAME. *Retaxation.*

Retaxation of costs in a criminal case on motion of a County Judge, under § 673, Shannon's Code, is not precluded by the fact that he had inadvertently or erroneously issued a warrant for the same, and he is justified in refusing to pay the warrant until the costs have been retaxed. (*Post pp. 242, 243.*)

Code construed: § 673 (S.); § 586 (M. & V.); § 528 (T. & S.).

4. SAME. *Retaxation not barred.*

Retaxation of costs in a criminal case, on motion of the County Judge, as provided by § 673, Shannon's Code, is not barred,

though not sought at the first term of the Court after judgment. (*Post, pp. 241–243.*)

Code construed: § 673 (S.); § 586 (M. & V.); § 528 (T. & S.).

5. SAME. *Illegal, stricken out.*

A judgment for costs against the State or county, which is not authorized by statute, is void. Neither the issuance of a warrant nor the certification by the Judge and Attorney-general will preclude retaxation of such costs. (*Post, p. 244.*)

Case cited: Morgan *v.* Pickard, 86 Tenn., 211.

6. MANDAMUS. *Not allowed, when.*

Under mandamus against a County Judge to compel payment of a county warrant which is in part illegal, the Court will not compel the issuance of a new warrant for the amount justly due, while the old one is still retained and outstanding. (*Post, p. 240.*)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

TREWHITT & STANFIELD for Donaldson.

C. R. EVANS and COOKE, SWANEY & COOKE for Walker.

WILKES, J. These cases are heard together, and involve the same questions. They are actions of mandamus by the plaintiff to enforce the payment of county warrants issued to and held by him for certain costs or fees claimed as District Attorney for the Fourth Judicial Circuit.

The plaintiff has been District Attorney of this circuit since September 1, 1894, and the defendant has been County Judge of Hamilton County for the same time. Plaintiff prosecuted persons charged with various offenses, and judgments in his favor were entered, it is claimed, for certain fees arising out of such prosecutions, amounting in the aggregate to the sum of $970. After the judgments were entered in the Circuit Court, the Clerk of that Court made out bills of cost, and they were examined and approved by the Circuit Judge and District Attorney, placed of record, and presented to defendant for payment. He issued his warrant accordingly, but soon after directed the County Trustee not to pay it, and payment was thereupon refused. Mandamus proceedings were thereupon commenced to compel the payment of the warrant. It is admitted by the defendant that $227.50 of the amount included in the warrant is correct, and an offer is made to issue a new warrant for this sum upon return of the old one, which, it is claimed, is incorrect, and contains and embraces improper items as against the county.

Defendant bases his refusal to pay upon the provisions of the Act of the extra session of 1891, Chapter 22 (§ 585, M. & V. Code; Shannon, §§ 672, 673), and claims that, under the provisions of these and other statutes, he had a right to refuse to issue a warrant for costs if he considered it illegal or not properly taxed, until he can move the Circuit or Criminal Court for a retaxation, and that he can

strike out, under the Acts of 1891 (Shannon, § 674), and refuse to pay costs, if he deems them illegal, and that these remedies continue, though he may have issued a warrant recognizing such illegal costs, when done through misapprehension and mistake, inasmuch as such warrants are not negotiable, and that he has a right to interdict the payment of a warrant improperly and inadvertently issued for fees not justly due. He charges that a portion of the fees claimed, and for which warrant has issued, are not justly due the petitioner, and are improperly taxed without warrant of law.

Upon the coming in of the answer of the County Judge, the petitioner moved to make the mandamus peremptory, and, upon the record as thus made up, together with the bills of cost, execution and rule dockets, and judgments of the Court allowing costs, the causes were heard. The Court overruled a motion for a peremptory writ, and dismissed the petition at petitioner's cost, from which action plaintiff has appealed to this Court and assigned errors.

It is said that the bills of cost for which the $970 warrant was drawn included 199 cases at the May term, 1896, which were ignored by the grand jury, and no indictment was found; 98 cases at the same term, in which a *nolle prosequi* was entered after the indictment was found, making a total of 297 cases in which a fee of $2.50 was charged and allowed against the county, aggregating a total of $742.50. As to the remainder, or $227.50, no com-

plaint is made, and for that amount the County Judge expresses willingness to issue warrant upon return and surrender of the original warrant for $970. The answer admittted that $294.50 of the $970 was correct, but this appears to have been a clerical mistake in calculation, and only $227.50 is actually due, according to the County Judge's contention and view of the case.

It is insisted in the assignment of errors that judgment should have been entered at least for the amount conceded to be due. This, we are of opinion, is not error. If the warrant for $970 is not correct, the County Judge should not be required to issue another warrant covering, in part, the same items, so long as the $970 warrant is outstanding and claimed to be valid.

It is said that clauses 1, 2, 3, 4, and 5, of section 7 of the answer of the County Judge should have been stricken out on demurrer or (on the motion for peremptory mandamus, which is its equivalent) because they state conclusions of law, and attempt to collaterally attack judgments of the Court unappealed from, and because subsec. 4 is not borne out by the remainder of the record. We think this assignment is not well made. The clauses referred to state facts as well as conclusions of law thereon, and, upon demurrer, should be treated as true. So far as they are contradicted by the record, we must presume the Court was not influenced thereby. The whole of the matters set up in this

assignment are fully covered by other assignments and disposed of therein.

It is said the Court erred in holding that the District Attorney is not entitled to fees in cases when a *nolle prosequi* is entered. It is said that his right to such fees is clearly fixed by statute, and we are referred to Shannon, §§ 7157, 7619, and to the decision of this Court in *State* v. *Harris*, 4 Lea, 183.

We are of opinion this matter of District Attorneys' fees is governed and set at rest, so far as the county is concerned, by § 6380, Shannon's compilation, which is as follows: "In all cases of misdemeanor where a *nolle prosequi* is entered and cause stricken from the docket, and the county is taxed with the cost, no fee shall be taxed or allowed the Attorney-general." Also § 6383: "No cost or tax fee is allowed the Attorney-general when a bill of indictment is ignored by the grand jury or the prosecution fails by reason of any defect in the pleadings."

It is said that application to retax the costs should have been made at the first term of the Court, and it is too late now to ask for a retaxation, inasmuch as the judgments for costs were not appealed from, and the warrant has been issued for them, and is now in the hands of the plaintiff.

The provisions of the statutes relating to this matter are §§ 672 and 673, Shannon's compilation, and are in the following words and figures:

"SEC. 672. No warrant shall be drawn for costs against a county unless the same has been regularly taxed by the Clerk, examined by the District Attorney and presiding Judge of the Court in which the costs accrued, and by them certified, under the seal of the Court, to be correctly taxed and lawfully chargeable upon the county.

"SEC. 673. If the Judge or Chairman of the County Court, when a bill of cost thus authenticated is presented to him, and his warrant for the same demanded, conceives that said cost, or any part of it, is not lawfully chargeable to the County, he may defer the issuance of his warrant till he can move the Court for a correction of the taxation."

We need not consider nor pass upon the provisions of Sec. 674, which is the Act of 1891, Ch. 22, Sec. 5, the validity of which is questioned, as the matters involved may be determined without regard to that Act. The provisions of §§ 672 and 673, providing for a retaxation of costs, are not limited as to the time when such retaxation may be had. It is, of course, the policy of the law and the proper practice for the County Judge to make an examination as soon as may be of all bills of costs against the county and to promptly move for a retaxation as soon as he discovers any errors and opportunity offers. It is also evident he should do so before he issues his warrant for the costs, but the statutes have interposed no time limit which should defeat a revision, and this Court would not be dis-

posed to fix one. Nor would the issuance of a warrant inadvertently or erroneously, preclude and estop the County Judge, as financial agent of the County, from denying and forbidding its payment in the hands of the party to whom it is issued, or perhaps others (as it is not negotiable paper), until it could be purged of its illegal and unauthorized items.

Again, it is said the action of the trial Judge and District Attorney in examining and certifying costs, has the force and effect of a judgment of the Circuit Court, and, if unappealed from, cannot be collaterally attacked in such proceeding as this. The Court below was of opinion that if these certifications should be treated as judgments, still they would be void because they show upon their face that they embrace items not allowed by law. The statute provides (Shannon, § 6352), "that no officer is allowed to demand or receive fees or other compensation for any service further than is expressly provided by law." And again (§ 7583): "Officers are entitled to no other fees in criminal cases except such as are expressly provided by law, and in no case are they entitled to payment from the State or county unless expressly allowed."

The whole system shows that the Legislature intended to throw double safeguards around the State and county treasuries, by providing that bills of cost against the State and county should be made out so as to show the specific items; that they

should be examined, entered of record, and certified to be correct by the Court or Judge before whom the cause was tried or disposed of, and also by the District Attorney, and they are given full power, and it is made their duty, to examine into, inspect, and audit all bills of cost accruing against the State or county, and disallow any part or all of said bills of cost that may be illegally or wrongfully taxed against the State or county. Shannon, § 7593. When this has been done, still, if the County Judge deem that any items are improperly taxed and embraced in the bill of costs, he may bring the matter before the trial Judge and ask for a retaxation of costs and the cutting out of all illegal and unauthorized items. Neither the issuance of a warrant nor the certification by the Judge and Attorney-general would preclude this retaxation of cost. A judgment for costs against the State or county which is not authorized by statute is void, and the County Judge cannot legally pay a void judgment. *Morgan* v. *Pickard*, 2 Pickle, 211.

The trial Judge denied the prayer for the writ of mandamus, and in doing so we think there was no error, as petitioner does not show a right to this extraordinary writ, and we affirm the judgment of the Court below and dismiss the petition at the cost of relator and his surety.

KIMBRO *v.* INSURANCE CO.

(*Knoxville.* September 28, 1898.)

1. COURT OF CHANCERY APPEALS. *Remedy for defective findings.*

The remedy for defective or insufficient findings by the Court of Chancery Appeals is an application to that Court for a more full and definite finding, and not by assignment of error on appeal. (*Post, pp. 246, 247.*)

2. SAME. *Rulings as to evidence.*

The Chancellor's error in the rejection of evidence is cured by the action and report of the Court of Chancery Appeals, that it took all the evidence into consideration in its findings. (*Post, pp. 247, 248.*)

3. FIRE INSURANCE. *Evidence when policy is ambiguous.*

Where there is ambiguity as to date of payment of premiums in a fire policy, it is proper to consider the application and the premium notes in connection with the policy, to ascertain its true meaning in this respect. (*Post, p. 248.*)

Case cited: Dale *v.* Ins. Co., 95 Tenn., 38.

4. SAME. *Date of payment of premiums.*

Premiums are payable on the first day of March of each year, under a policy running several years, and providing that premium installments shall fall due "on the first days of March of 1893, 1894, 1895, and 1896." (*Post, p. 248.*)

5. SAME. *Policy not forfeited for nonpayment of premium.*

Under a policy taken out March 10, 1892, to run until March 10, 1897, and providing that premiums should be paid on the first day of March of each year, and the company should not be liable for a loss occurring while a premium was due and unpaid, the failure to pay the premium due March 1, 1894, will not relieve the company from a loss occurring March 9, 1894. Each

premium covers one year from the next succeeding tenth of March. (*Post, pp. 249–251.*)

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. McConnell, Ch.

W. T. Murray for Kimbro.

White & Martin for Insurance Co.

Wilkes, J. This is an action to recover upon a fire insurance policy. The Chancellor gave judgment for a portion of the amount covered by the policy, to wit, $375 and interest from filing the bill. The Court of Chancery Appeals reversed this judgment, denied the insured any relief, and dismissed his bill, and the cause is before us on his appeal and quite a number of assignments of error.

The first and second errors assigned are, in substance, that the Court of Chancery Appeals failed to find and report the facts of the case so as to enable this Court to properly apply the law, and that it failed to recite certain evidence to which exception was taken in the Court below.

These assignments are not well made. The report of the Court of Chancery Appeals as to the facts and law is quite full, and fairly presents the

case in its legal aspect. While the evidence is not set out verbatim, it is not necessary it should be done, so that the questions at issue and those settled are clearly presented, and the same may be said of the evidence as to which exception was made. Besides, if this contention were good, the remedy is an application to the Court of Chancery Appeals for a more full and definite finding.

The third assignment is not well made. This is in regard to the admission of certain evidence. The Court of Chancery Appeals report that they considered all the evidence, both that objected to and that not excepted to, as it considered it competent and admissible in one aspect of the case. Then the appellants had the benefit of the testimony to the rejection of which they excepted, and the appellant has no ground to complain.

The materiality of this question as to the testimony arises out of the fact that appellant desires to add to the policy, and to show that the real contract with the insurance company was not fully embodied in the policy; that blanks were improperly filled in by the agents of the insurance company, and that fraudulent statements were made to procure the same, and that conditions as to time of payments of premium were waived.

The Court of Chancery Appeals states that it did consider all the evidence objected to as if it was competent, but was still of opinion, upon all the evidence, that the appellant had not, as a fact,

made out his contention, so that there is no error in this matter of testimony to which the appellant can now assign any error. If there was error, it was against the insurance company.

The fourth assignment is that it was not proper to consider the application, the policy, and premium notes together, in order to arrive at a proper construction of the policy as to when the premium was due. This was not error, but was correct when there was any ambiguity in the policy, as may be said to be the case here. *Dale* v. *Cont. Ins. Co.*, 11 Pickle, 28–52.

The fifth assignment is that the Court of Chancery Appeals incorrectly held that the premiums on the policy, by its terms, were payable on first of March each year, and that the language implied that such premiums might be paid on any day of March near the first. The language of the policy is that the installment note of $23.80 shall fall due as follows: $5.95 on the first days each of March, 1893, 1894, 1895, and 1896. While the language is awkward and ambiguous, it evidently means that the premium is due on the first day of March of each year, and the plural is used not to designate more than one day of the month, but to designate one day in each year. All the papers, we think, are in accord with this view.

The sixth assignment is a general one—that the Court of Chancery Appeals erred in reversing the Chancellor and dismissing the bill, and virtually em-

braces the others. The grounds for this assignment have already been considered separately. The facts are that the policy was taken out March 10, 1892, to extend to March 10, 1897. The premium was to be paid on the first day of March each year, as we think from the policy and all other papers, and as found by the Court of Chancery Appeals.

The policy provided against liability if a loss occurred while a premium note was past due and unpaid, and the note had a like provision. The fire occurred March 9, 1894. The premium due March 1, 1894, was then past due and unpaid, and the Court of Chancery Appeals was of opinion, therefore, there was no liability.

Looking to the findings of the Court of Chancery Appeals, and agreeing therewith as we do, still we are of opinion it is in error in holding that the company is not liable. Looking to the policy and all the papers, we are of opinion that, while they provide that the note shall fall due on the first of March each year, and not later, still it is, we think, perfectly evident that the policy could not lapse or be forfeited until the tenth of March each year, which was the limit or expiration of its life.

The cash payment of $4.20 was clearly intended to keep the policy alive for one year from the tenth of March, 1892. The first installment note of $5.95 was to be paid by the first of March, 1893, and was to keep the policy alive for the second year—that is, until March 10, 1894. While, therefore,

the insurance company had a right to treat the policy lapsed and forfeited on and after March 1, 1894, if the note then due was not paid, such lapse could not take effect until the termination of the time to which it was paid up—that is, the tenth of March, 1894. In other words, the installment note due March 1, 1894, was to pay for insurance for the year commencing March 10, 1894, and ending March 10, 1895, and could not affect the insurance up to March 10, 1895, which was already paid up.

The installments were payable in advance, yearly, on the first of March, but, when paid, they insured the property until the tenth of March of each succeeding year, so that when the last note should be paid on the first of March, 1896, it would make the insurance effective until the tenth of March, 1897. It could not be contended that if the loss occurred between the first and tenth of March, 1897, that the property was not covered and the insurance not in force, all notes being paid, and yet, if we hold that the advance payment on the first of March only kept the policy alive till the first of March thereafter, then the payment of the same premium on March 1, 1896, would keep it alive ten days longer than the similar payments made the years before. That the policy would be alive and extend to March 10, 1897, at twelve o'clock noon, there can be no doubt under its express provisions.

The clear construction of the policy is that each yearly installment was to pay for insurance for one

year, and that this year was to run from the tenth of March to the tenth of March in each year, though the yearly premium was payable in advance on the first of March. Why the cash premium was only $4.20 for the first year is not explained, and we need not stop to consider, as it is immaterial.

The decree of the Court of Chancery Appeals is reversed, and the decree of the Chancellor affirmed with interest and cost.

Brown *v.* Electric Railway Co.*

(*Knoxville.* September 28, 1898.)

1. Action. *Of widow for husband's injuries barred by latter's compromise.*

An adjustment by deceased, in his lifetime, of his claim for damages for personal injuries, bars an action by his widow to recover for his death resulting from such injuries. (*Post, p. 253.*)

2. Master and Servant. *Servant assumes risk, when.*

Danger from a bank or wall of earth falling is open to common observation, and is a risk that a servant working in its vicinity assumes. (*Post, p. 256.*)

Cases cited and approved: 34 Minn., 95; 41 Minn., 290; 70 N. W. Rep., 976; 105 N. Y., 159; 24 N. E. Rep., 748; 65 Iowa, 237; 123 N. Y., 5; 168 Mass., 396.

FROM HAMILTON.

Appeal from Circuit Court of Hamilton County. Floyd Estill, J.

Case & Case for Brown.

Brown & Spurlock for Railway Co.

*On the question how many distinct causes of action arise from injuries resulting in death, there is a review of the authorities in a note to *Louisville & Nashville Railroad Co.* v. *McElwain* (Ky.), 34 L. R. A., 788.—Reporter.

WILKES, J. This is an action for personal injuries, resulting in the death of plaintiff's husband, Andrew Brown. Defendant introduced no evidence, but demurred to that of plaintiff, which was sustained by the trial Judge and the suit dismissed, and the plaintiff has appealed and assigned errors.

The defendant, as one of his pleas, stated that the matter of damages arising out of this accident was compromised and settled with the deceased in his lifetime.

There was a replication to this plea, among other things, to the effect that this settlement was before the husband died, and before the plaintiff's right of action accrued, and was no bar to it. The Court, on motion, struck out this part of the replication, and this is assigned as error. There was no testimony on this feature of the case, and, under the shape it has assumed, it is not material to be considered. It may be said, however, that it was not error to strike out the replication, since, if there had been a settlement and adjustment made by the deceased in his lifetime of his claim for damages, it would bar any subsequent action by the widow. Of course the good faith and binding effect of such settlement could be put in issue as was done, but that also becomes immaterial under the demurrer, which raises and relies solely upon the theory that there was no cause of action to any one arising out of the accident.

The facts as disclosed by plaintiff's proof are

that her husband was an illiterate negro, an ordinary laborer, but there is no proof that he was weak minded or imbecile. He was employed with another to dig and uncover an escape pipe at or near the defendant's power house, in an alley between the power house and a frame house on the east of it. This alley was some ten feet wide. The ditch started in at a depth of three or four feet at the north, and deepened to seven feet or more at the edge of Seventh Street. Beneath the surface the dirt to be excavated was loose for some distance and then there was clay, and it was thrown out, as excavated, on the east side of the ditch, next to the power building. There was a ledge of about three feet on which the dirt was banked up. There were no stays across or along the ditch, and no protection from its falling in or caving in.

It did fall in on Andrew Brown, while he was excavating at a place where it was about six feet deep, and crushed him so that he died. An expert engineer, Fritzwater, had charge of the work, and Brown was working under his directions and obeying his orders. After the accident defendant took precautions to avoid further caving. The pipes were rusted.

It is insisted that this is not a case where the employe has full knowledge of the danger and assumes the risk; that he was an ignorant negro, and could not be presumed to know his danger from the character of the soil, which was filled in with cinders

and debris, nor that the banking of the dirt upon the narrow ledge would cause it to cave in; and that all these facts and the danger consequent on them were well known to the engineer and not communicated to the employe; that it was the duty of the employer to furnish a safe place to work in; that the work was done under the immediate supervision of the engineer who was present; that stays and supports for the excavation should have been provided and used; and that the evidence should have gone to the jury, especially in view of the ignorance of the deceased, as to whether he knew of the danger. The right of recovery is resisted on the idea that the danger, if any, was patent; that it could be appreciated and known by the weakest intelligence, and that the deceased, when he undertook the work, assumed the risks incident to it.

If the plaintiff in this case was aware of the danger attending his work, or it was so obvious and apparent that a man of ordinary intelligence would have seen it, then he must be held to have taken its risks and hazards, and would not be entitled to recover. Bailey's Personal Injuries, Secs. 501, 502*a*, 796, 796*a*.

The witnesses state that the loose character of the soil and the banks was apparent, and the danger of their caving in must have been obvious to the most ordinary intelligence and to a common laborer. The witness, McQuade, says that it could be seen as you went down into the ground that it was

made earth, and any man of ordinary sense could see the kind of soil it was; that it was principally filled in with cinders, which was loose stuff, and the person who was digging could tell this better than anyone else. The witness, Gass, states substantially to the same effect, and says that any man of ordinary sense could tell whether he was digging through cinders or clay. It clearly appears, therefore, that the deceased knew the danger to which he was exposed, and continued to work, and in such cases he must be held to have assumed the risks, and is not entitled to recover for injuries sustained.

Danger from a bank or wall of earth falling is one open to common observation, and is a risk assumed by anyone walking therein. *Olsen* v. *McMullen*, 34 Minn., 95; *Pederson* v. *Rashford*, 41 Minn., 290; *Swanson* v. *Railroad*, 70 N. W. Rep., 976; *Loughlin* v. *State*, 105 N. Y., 159; *Del Seynore* v. *Hallihan*, 24 N. E. Rep., 748; *Evans* v. *City of Council Bluffs*, 65 Iowa, 237; *Krantz* v. *L. I. R. R. Co.*, 123 N. Y., 5; *Hughes* v. *Gas Co.*, 168 Mass., 396.

Let the judgment of the Court below be affirmed with costs.

TROTTER *v.* FURNITURE CO.*

(*Knoxville.* September 28, 1898.)

MASTER AND SERVANT. *Promise to repair will not avail servant, when.*

A promise by the master to repair a defective appliance does not relieve the servant from the assumption of the risk in continuing in his employment after the expiration of the time for fulfillment of the promise, under circumstances which indicate that the promise will not be fulfilled.

Cases cited: Railroad *v.* Handman, 13 Lea, 423; Brewer *v.* Tenn. C. & I. Co., 97 Tenn., 615; 8 So. Rep., 216, 218; 95 Wis., 6.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

PAYNE & PAYNE for Trotter.

PRITCHARD & SIZER for Furniture Co.

WILKES, J. This is a suit by an employe against his employer for injuries sustained in his employment, and alleged to be due to the employer's negligence. The declaration alleges unsafe, unsuitable,

*The rights of a servant who continues work on the faith of his master's promise to remove a specific cause of danger, are discussed in an elaborate note to *Illinois Steel Co.* v. *Mann* (Ill.), 40 L. R. A., 781.—REPORTER.

and dangerous condition of a saw, and the machinery and apparatus attached thereto. The first count charges that this want of safety was known to defendant company, but not to the plaintiff. The second count alleges that the defendant promised plaintiff to have same repaired immediately, and plaintiff, relying upon said promise and believing that defendant would repair as it had promised to do, continued to operate it. The plaintiff introduced his evidence, and it was formally demurred to, and there was joinder in the demurrer and a trial before the Judge, who sustained the demurrer and dismissed the plaintiff's suit, and he has appealed and assigned as error this action of the trial Judge and his refusal to submit the evidence to the jury which had heard it.

The evidence showed that the plaintiff was a man about twenty-eight years of age; that he had been in the employ of the defendant company several years, for two of which he had operated the saw which injured him, and for six or seven years had operated a trip saw. About ten days before the injury, a rope attached to the saw frame operated by the plaintiff broke. It was attached to the frame at one end and to a weight at the other, and its function was to hold the saw frame back against the wall when not in use. It was pulled out when wanted for use by a handle attached to the frame, and, after being used, the handle would be released and the weight would pull the frame back out of the way.

When the rope broke, the plaintiff reported the fact to Lockwood, the repairer of the defendant's machinery, and he tied the rope together, and on plaintiff's objecting to running it that way, because dangerous, Lockwood went to Parham, general manager, and told him the rope was broken, and he would like to have a new one. Parham asked, "Do you want it now, or will morning do you?" to which Lockwood replied, "I will let it go until morning," and Parham said, "I will bring it down with me in the morning."

Lockwood returned to plaintiff and told him what Parham had promised, and said he thought the mended rope was sound and sufficient until then, and for him to go on with it until the next morning. The new rope was not brought in the morning, and plaintiff continued to operate the saws with the old rope as it was for some ten days, without further complaint, when it again broke. The saw flew out and struck plaintiff's arm, and injured his elbow. The plaintiff went to his mother and had his arm bound up, and she attended to it for some ten days or more, when a physician examined it and dressed the arm several times. Plaintiff was disabled from work for some months, and, according to his statement, his arm is stiff and severely injured.

It is evident that plaintiff could not on this evidence, recover upon the first count in the declaration, which alleged knowledge of defects on part of

the company and want of knowledge on plaintiff's part. If he can recover at all, it must be on the second count.

The general rule is, that a servant assumes the risks when he enters or continues in employment, when he knows the tools or machinery are dangerous, unfit, and unsuitable, but nevertheless works with them and is injured. Bailey's Personal Injuries, Secs. 506, 510; *Railroad Co.* v. *Handman*, 13 Lea, 423; *Brewer* v. *Tenn. Coal & Iron Co.*, 13 Pickle, 615.

In order to recover in such cases, he must show knowledge or negligent ignorance on the part of the master, and a want of knowledge or excusable ignorance on the part of the servant (*Railroad Co.* v. *Handman*, 13 Lea, 430); and when each is equally competent to judge of the risks and hazards, there is no ground of recovery. Bailey's Personal Injuries, Sec. 778.

This case must, however, turn largely upon the effect of the promise to repair. The averment is that the promise was to repair immediately, and that a new rope would be furnished the next morning. The averment is not that plaintiff was led to continue in the employment by the promise, but is only that he believed the repair would be made, and relied on the master's promise. "It must appear that the servant was led to continue in the employment by the master's promise that the defect complained of would be removed." Bailey's Master's

Liability, 208; *Brewer* v. *Tenn. Coal & Iron Co.*, 13 Pick., 615, 619.

The assurance of the master that the defect shall be remedied is an agreement by him that he will assume the risk for a reasonable time. This promise will be implied to continue only a reasonable time, and the injury must have occurred within the time within which the defects were promised to be removed. If the employe continues longer than this, he does so without reliance on the promise, and is as hazardous and hopeless of remedy as though the promise had not been made. It is a waiver of the defects agreed to be remedied. Bailey, Personal Inj., Secs. 3112, 3112*a*.

In *Eureka Co.* v. *Bass*, 8 So. Rep., 216, 218, the Supreme Court of Alabama said: "The injury must have occurred within the time at which the defects were promised to be remedied. If the employe continues to expose himself to the danger by remaining in service longer than this, he does so in the face of the fact that the promise of the employer is violated, and that he had no reasonable expectation of its fulfillment. He can therefore no longer rely upon the promise. A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. 2 Bailey's Pers. Inj., Secs. 3106, 3107.

In this case the appliance was of the simplest nature. The danger was obvious, and better known

to plaintiff than perhaps anyone else. He continued to use the broken rope without complaint. He made no demand to have the defect remedied after the failure to furnish the new rope next morning. He continued to operate the saw for ten days. In the meantime the repairer, Lockwood, had left the employ of the company, and plaintiff made no complaint to his successor, and must be held to have taken the risks, and not to be relying on the defendant's promises. *Erdman* v. *The Illinois Steel Co.*, 95 Wis., 6 (S. C., 60 Am. St. Reps., 66).

The failure to supply the new rope the next morning, as promised, was no doubt due to the fact that Lockwood, whose business it was to supply it, left the employ of the company, and no doubt the rope would have been supplied if Parham, the general manager, had been reminded of the condition of affairs and his promise. However this may be, the plaintiff continued, without further protest, to use the old rope, and must be held to have taken the risks. We do not think it would have been proper in this case to have submitted to the jury the question as to what was reasonable time. The promise fixed the time.

Let the judgment be affirmed with costs.

COTTON OIL CO. *v.* SHAMBLIN.

(*Knoxville.* October 1, 1898.)

DECLARATION. *Certainty in averment of negligence required.*

A declaration in an action for damages for the negligent killing of a person, which avers, in general terms only, that defendant had wrongfully and negligently killed the deceased, without stating the facts constituting the negligence, is bad on demurrer.

Code construed: §§ 4602, 4438 (S.); §§ 3593, 3441 (M. & V.); §§ 2881, 2747 (T. & S.).

Cases cited and approved: Evans *v.* Thompson, 12 Heis., 536; Cherry *v.* Hardin, 4 Heis., 202; 30 Conn., 521 (S. C., 79 Am. Dec., 278); 34 Conn., 136 (S. C., 91 Am. Dec., 718); 31 Ohio St., 557; 69 Texas, 359; 8 Gill & John., 248 (S. C., 29 Am. Dec., 543); 35 S. C., 381 (S. C., 28 L. R. A., 855); 109 N. C., 692 (S. C., 52 A. & E. R. R. Cas., 490); 90 Ill., 425; 30 Grattan, 805; 71 Mo., —— (S. C., 2 A. & E. R. R. Cas., 146); 74 Mo., 364 (S. C., 7 A. & E. R. R. Cas., 382); 32 W. Va., 370 (S. C., 37 A. & E. R. R. Cas., 179).

Cited and distinguished: Railroad *v.* Pratt, 85 Tenn., 9; Coal Co. *v.* Daniel, 100 Tenn., 65.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. FLOYD ESTILL, J.

COOKE, SWANEY & COOKE and RICHARDSON, CHAMBERS & HEAD for Cotton Oil Company.

PRITCHARD & SIZER for Shamblin.

BEARD, J. This action was instituted to recover damages for personal injuries received by the intestate of the defendant in error, while engaged in the service of the plaintiff in error, from the effect of which, it is alleged, he subsequently died. Upon an issue raised by the plea of "not guilty," the case was heard, the trial resulting in a verdict in favor of the plaintiff below for $5,000. The record is before us on assignments of error to the action of the lower Court.

The declaration filed in the cause is in the words and figures following, viz.: "The plaintiff, G. W. Shamblin, administrator of the estate of David L. Shamblin, deceased, sues the defendant, Chattanooga Cotton Oil Company, which is in Court by summons, for twenty-five thousand dollars ($25,000) damages, for that, heretofore, to wit, on the — day of January, 1896, the defendant wrongfully and negligently killed David L. Shamblin, who left next of kin as follows: a father, G. W. Shamblin, mother, Sarah J. Shamblin, four brothers, John, Joe, Julius, and G. B. Shamblin, four sisters, Maggie, Mary, Annie, and Lucy Shamblin, for whose use the plaintiff brings this suit, to their damages as aforesaid. Plaintiff herewith exhibits his letters of administration, and demands a jury to try the cause." (Tr., p. 2.)

To this declaration a demurrer was filed, raising the objection that it did not allege a cause of action against the defendant, in that it failed to state any facts or circumstances to put the defendant on notice

of the negligence which was complained of, and which the company was required to defend.

"Pleading," says Mr. Chitty, "is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense; it is the formal mode of alleging that in the record which would be the support of the action or the defense of the party in evidence." Continuing, this author adopts and embodies in his text the statement of Mr. Justice Buller, that "one of the first principles of pleading is, that there is only occasion to state facts, which must be done for the purpose of informing the Court, whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." 1 Chitty on Pleadings, p. 213. Again, under the caption of the "Modes of Stating Facts," he emphasizes it as the "principal rule" of pleading, that the facts "must be set forth with certainty, by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the Court who are (?) to give judgment." *Id.*, p. 233. The absolute necessity of this rule and for its enforcement has been recognized by many Courts.

In *McCune* v. *Norwich City Gas Co.*, 30 Conn., 521 (S. C., 79 Am. Dec., 278), the plaintiff in his declaration alleged that the defendant company was organized to make and sell illuminating gas, with its pipes laid in the streets of the city, for the purpose of enabling it to convey gas to its customers; that plaintiff's rooms were supplied with pipes and fixtures, which were connected with the mains of the defendant corporation, and that, for a period of time it had supplied him, and that he still desired to continue the use of its gas, and was willing to pay for the same, and that it was the duty of the defendant to supply him, but that, in wanton disregard of its duty, it declined to do so. With regard to this declaration, the Court said: "No contract for the supply of gas for an indefinite period is alleged to have been made by the defendant, nor, in fact, any contract at all. The entire foundation of the plaintiff's claim, as it is set out in his declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue the supply. But no facts are stated from which such duty or obligation arises, and the allegation of a duty or liability is of no avail and will not help the declaration unless the facts necessary to raise it are stated. It is but the statement of a legal inference, never traversable and of no avail in pleadings." Subsequently the same Court, in an action for the recovery of damages for a personal injury resulting in death, reannounced this as an essential rule to

good pleading. *Harrison* v. *City of New Haven*, 34 Conn., 136 (S. C., 91 Am. Dec., 718). In *Railroad* v. *Wilson*, 31 Ohio St., 557, and *Morrison* v. *Insurance Co.*, 69 Texas, 359, this rule is recognized and applied.

In *Pa., etc., Nav. Co.* v. *Dandridge*, 8 Gill & John., 248 (S. C., 29 Am. Dec., 543), in arresting a judgment rendered upon a declaration, full in every other respect, which failed to allege a consideration for the defendant's promise, the Court said: "The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant being thereby forewarned of the nature of the proof to be preferred against him, may, if necessary, be prepared to contradict, explain, or avoid it."

Madden v. *Port Royal Ry. Co.*, 35 So. Car., 381 (S. C., 28 A. L. R., 855), was an action to recover for personal injuries. With regard to the pleadings in that case, it was said by the Court that "negligence being a mixed question of law and fact, it is not sufficient to allege in general terms that an injury has been sustained by reason of the negligence of the defendant, but the plaintiff must go on, and allege the facts constituting such negligence."

n *Carley* v. *Richmond*, 109 N. Car., 692 (S. C., 52 A. & E. R. R. Cas., 490), it was held that a complaint, averring that the plaintiff was, by the

wrongful act, neglect, and default of the defendant, slain and killed, without more, was bad pleading, and in *Chicago, etc., R. R. Co.* v. *Harwood*, 90 Ill., 425, there was the same holding as to the averment of the declaration that a railway company "carelessly, etc., managed its engine and cars," so as to inflict injury, unsupported as it was by any statement showing in what the carelessness, etc., consisted, while in *Baltimore R. R. Co.* v. *Whittington*, 30 Grattan, 805, it was ruled, on demurrer, that a declaration alleging generally, without stating specific acts, that the plaintiff was injured in consequence of the negligence of the defendant in operating its road and cars, etc., was too general.

In *Waldhier* v. *Han. & St. Jos. R. R.*, 71 Mo. (S. C., 2 A. & E. R. R. Cas., 146), a petition by an employe seeking a recovery for an injury, and alleging, without stating specific facts, that the injury was the result of the negligence of the railroad company in using defective machinery and in running and managing its cars, was held fatally defective for uncertainty, and the same rule was applied to an answer to a complaint in *Harrison* v. *Mo. Pa. R. R.*, 74 Mo., 364 (S. C., 7 A. & E. R. R. Cas., 382).

In *Searle* v. *Kanawha, etc., R. R.*, 32 W. Va., 370 (S. C., 37 A. & E. R. R. Cas., 179), the rule requiring certainty in the statement of the facts constituting the cause of action is recognized as a correct one, but, as it had been modified by statute in that State, less fullness of detail was required

than in other States where there was no such statutory modification.

The cases that have been here collected were determined in States some of which adhere, in a general way, to the requirements of common law pleading, while in others the Code practice prevails. With respect to the latter, Mr. Lawson, in his Rights, Rem. & Pr., Vol. 7, Sec. 3462, on the authority of many cited cases, says that "it is a *sine qua non*, under Code pleading, that the complaint or petition must contain a statement of the facts constituting the cause of action. It is the ultimate facts which must be stated, not the evidence of facts or prohibitive facts, or the legal conclusions based on the facts." The rule of the common law, as has been seen, was not less strict. Under both systems this declaration is fatally defective.

It must be conceded that some of the Courts of this country at times, and other Courts, possibly, all the time, have permitted plaintiffs to maintain actions for personal torts, upon a simple statement that they were the result of the negligence of the defendants, but we think a majority of the Courts and the best considered cases recognize it as a requirement of good pleading that the facts constituting the negligence shall be set out, and especially in such a case as the present. As is well stated in the very valuable Enc. of Pl. & Pr., Vol. 5, p. 861, it is necessary that "all the circumstances essential to support an action for death by wrongful

acts must be alleged or appear in substance on the face of the declaration or complaint."

Coming now to this State, we find that the Code (Shann.), § 4602, provides that "all pleadings shall state only material facts, without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form."

In construing the sections of the Code on the general subject of pleading, including that just quoted, in *Evans* v. *Thompson*, 12 Heis., 536, this Court said: "These wise and wholesome provisions are based on the sound principle that the rights of litigants are not to be sacrificed to mere technical verbiage, . . . but are to be ascertained by the Courts, upon the statement of material facts in an intelligible form," etc.

In *Cherry* v. *Hardin*, 4 Heis., 202, this Court had occasion to deal with § 4438 of Shannon's Code (§ 2747 of the old Code), which is in these words: "All wrongs and injuries to the property and person . . . may be redressed by an action on the facts of the case," and construed it to mean that "matter without multiplicity of words is all that is required in notifying the adversary of what he is to answer or defend."

We are entirely satisfied that the declaration in question does not meet the requirements of these sections as they were construed in these cases. It is insisted, though, that it is good under the authority of *E. T., V. & G. R. R.* v. *Pratt*, 85 Tenn., 9,

and *East Tenn. Coal Co.* v. *Daniel*, 42 S. W. Rep., 1062. This is error. Neither of these cases involved a question of good pleading. In the first, the declaration set out the time and place of the injury, as well as the circumstances under which it occurred, and then alleged that the defendant "wrongfully and negligently ran its engines and cars . . . upon the plaintiff." Under this declaration, evidence was admitted, over the objection of the defendant, tending to show that it was negligent in failing to observe the statutory precautions. It was insisted here, as in the Court below, that this was error—as the declaration stated only a case of common law negligence. This was the sole question in that case, and this Court, speaking through the present Chief Justice, only reannounced the oft-repeated doctrine that our statutes, prescribing the duties of railroads, in order to avoid accidents, were declaratory of the common law, and it was therefore held that this evidence was competent. No objection was made in either Court to the declaration on the ground of insufficiency or vagueness and none was considered. In the second, the question was, Can a plaintiff in his declaration set out certain definite acts of negligence, and allege them as the occasion of his injury, and recover upon evidence of other and independent negligent acts? and this Court, through Justice McAlister, said he could not. To this point was the argument of the opinion directed, and to it the references and the statements are to be confined.

After a careful examination of the authorities, and especially our own statutes and decisions, we are satisfied that the Circuit Judge was in error in overruling the demurrer to the declaration in this case. This conclusion renders it unnecessary for us to consider other assignments of error.

The judgment is therefore reversed, and the cause is dismissed.

101 273
117 403

WISE & CO. *v.* MORGAN.

(*Knoxville.* October 1, 1898.)

1. NEW TRIAL. *Motion for.*

Under a rule of practice that requires a motion for new trial to specify the grounds relied on or the same shall be deemed waived, it is essential, in order to preserve the right to assign errors in Supreme Court, to set out, in the motion, errors that occurred at and during the trial, but not errors that occurred before the trial, in the rulings upon the pleadings. (*Post*, *pp. 276*, *277*.)

2. NEGLIGENCE. *Breach of statute.*

It is well settled that a failure to perform a statutory duty is negligence *per se*, and if the injury is the proximate result or consequence of the negligent act, there is liability. (*Post*, *p. 278*.)

Case cited: Queen *v.* Dayton Coal Co., 95 Tenn., 458.

3. DRUGGISTS. *Failure to label poisons.*

The druggist's negligence in failing to label a poisonous liquid or substance, as required by statute, is the cause of a child's death, killed by drinking it, and not the mother's act in permitting the same to remain within reach of the child, or the child's act in drinking it, when the mother was not informed of the poisonous character of the liquid or substance, and the child had not reached the years of discretion. (*Post*, *pp. 278–280*.)

4. SAME. *Same.*

The statute that forbids and declares it a misdemeanor for any person to sell or deliver "any poisonous liquid or substance without having the word 'poison' written or printed on the label attached to the vial, box, or parcel in which the same is sold," does not apply to medicines containing poisonous ingredients compounded by druggists upon the prescriptions of physicians. (*Post*, *pp. 280–285*.)

Code construed: § 6745 (S.); § 5634 (M. & V.); § 4830 (T. & S.).

5. STATUTES. *Construction.*

The Legislature cannot be supposed to intend its own stultification, and therefore, the Courts will restrain the language of a statute so as to avoid a construction that would lead to absurd consequences. The presumption against absurdity is probably a more powerful guide in the construction of statutes than the presumption against inconvenience or injustice. (*Post*, *pp.* *282*, *283.*)

FROM HAMILTON.

Appeal from Circuit Court of Hamilton County. FLOYD ESTILL, J.

PRITCHARD & SIZER for Wise & Co.

W. T. MURRAY for Morgan.

MCALISTER, J. Defendant in error recovered a verdict and judgment in the Circuit Court of Hamilton County, against Harry Wise & Co., for the sum of $3,000 damages for the negligent killing of his daughter, Ella Morgan, a child about three years old. The facts of the case are few and practically undisputed. In August, 1894, the child, being troubled with her eyes, was taken by her mother to an oculist for treatment. After an examination of the child's eyes, the oculist handed her mother the following prescription, to wit:

"Sulphate of atropia, one grain; acid boracic, two grains; water, two drachms; mix. Label: Two drops in right eye three times a day.

"DR. F. T. S."

This prescription was filled by the firm of Harry Wise & Co., druggists of experience and established reputation in the city of Chattanooga. It was filled in exact conformity with the formula, and a label was pasted on the bottle, showing the ingredients of the prescription, its number, and the date it was filled. This bottle was taken home by the mother and placed on the mantelpiece, some three or four feet from the floor. The medicine was used by the mother for four or five days in the treatment of the child's eye, and was then discontinued, but the bottle was still left on the mantelpiece. About two weeks after the treatment with this medicine was discontinued, the child, in the absence of its mother, and while left alone in the room, got a chair, climbed up to the mantel, procured the bottle, and poured a portion of the mixture in a cup and drank it. In a short time thereafter she developed all the symptoms of atropia, or belladonna poison, and died on the following day. The father thereupon brought this suit, as administrator, against the defendants, to recover damages for the death of the child. The gravamen of the action is that defendants failed to label the bottle "poison," as required by the statute, and that the death of the child was the proximate result of this negligence or breach of duty on the part of defendants.

The cause has been three times tried. The first verdict was for $1,000, which was set aside by the Circuit Judge upon the ground that the negligence

of defendants was not the proximate cause of the child's death. The second trial resulted in a verdict for $500, which was set aside for the same reason. On the third and last trial, plaintiff recovered a verdict for $5,000, and pending the motion for a new trial, he entered a remittitur of $2,000, and thereupon the Circuit Judge overruled the motion for a new trial, and pronounced judgment for the sum of $3,000.

Wise & Co. appealed, and have assigned errors. Plaintiff insists that assignments of error Nos. 1, 2, 4, 10, and part of 11, cannot be considered by this Court because not assigned on the motion for a new trial in the Court below, as required by the rule of that Court.

The first assignment in this Court is that the Circuit Court erred in overruling demurrer to plaintiff's declaration. Second, in sustaining plaintiff's demurrer to defendants' second and third pleas.

Counsel are in error in supposing that it was necessary to embody the questions made on the demurrer in the motion for a new trial. The demurrers had been acted on prior to the trial, and the action of the Court entered upon the minutes. Since the action of the Court upon the demurrers was in nowise connected with the trial of the cause, it was not necessary that such matters should again be brought to the attention of the Court on motion for a new trial. It is true that matters presented in assignments Nos. 4, 10, and part of 11, were

not presented on the motion for a new trial, as required by the rule of Court, and will not be considered by this Court. *Bruce & Wife* v. *Hale*, MS. opinion, Knoxville, September term, 1898.

The fifth assignment is that the Court erred in refusing the following request, namely: "If, taking into consideration the intelligence of the person to whom the substance was sold, and the purpose for which it was intended to be used, the druggist had no reason to anticipate or presume that it would be taken internally, then the taking of it internally, and the death resulting therefrom, would not be such a probable or natural result of the failure to label the bottle as would make the defendant liable."

The sixth assignment is that the Court erred in refusing the following request, namely: "If the mother put this bottle where she thought the child would not get it, and the child, unexpectedly to the mother, got a chair and climbed up to the mantelpiece, procured the medicine and drank it, then the drinking of the medicine, and the death of the child, was not the natural or probable result of the failure to put the poison label on the bottle, and the defendant would not be liable."

The seventh assignment is that the Court erred in refusing the following request, namely: "If the obtaining of the medicine by the child was not due to any fault or negligence of the plaintiff, and if the presence of the poison label would not have

deterred the child from drinking the substance, then the failure to put on such label would not be the proximate cause of the child's death, and the defendant would not be liable."

The eighth assignment is that the Court erred in refusing the following request, namely: "If the substance sold to Mrs. Morgan, from the drinking of which her child died, was not poisonous or dangerous when used for the purpose or in the manner it was intended, as indicated by the prescription on which it was sold, then the defendant was not required, under the statute, to put a poison label on the bottle in which it was contained, and his failure to do so would not be negligence."

It is argued, in support of these propositions, that if it be conceded that the failure to affix the poison label was negligence *per se*, yet that act was not the proximate cause of the injury, for the reason that the chain of causation was broken (1) by the fact that the drinking of the substance was not the natural or probable result of the failure to put on the label; and (2) by the intervening negligence of the mother in leaving the bottle accessible to the child.

It is well settled that a failure to perform a statutory duty is negligence *per se*, and if the injury is the proximate result or consequence of the negligent act, there is liability. 2 Thomp. on Neg., p. 1232, Sec. 5; *Queen* v. *Dayton Coal Co.*, 11 Pick., 458; 57 Am. Dec., 461.

But it is insisted that the mother's negligence, in leaving the bottle accessible to the child, was such intervening negligence on the part of a responsible agent as broke the chain of causation, and became itself the juridical cause. This might be so if the mother had been aware of the poisonous character of the substance, but it is not claimed she had such knowledge, and her testimony is quite positive that she was ignorant of it. If the bottle had been labeled "poison," the mother would thereby have been admonished of its dangerous character, and doubtless would not have left it exposed. The fact that the mother was ignorant of the ingredients in the mixture is made clear by the fact that, when she discovered the child had swallowed it, she was not alarmed, and did not deem it necessary at once to call in a physician. If the bottle had been labeled poison, the mother, on discovering the child had taken it, would have immediately taken steps to counteract the deadly potion. Nor can the act of the child in getting down the mixture from the mantelpiece, and drinking it, be invoked as an intervening and independent juridical cause. The child was an irresponsible agent; it had not reached years of discretion, and negligence was not imputable to it. The case of *Meyer* v. *King*, 72 Miss. (S. C., 35 L. R. A., 474), cited by counsel for plaintiff in error, and other like cases, are easily distinguishable from this one, in the important feature that each presented an intervening, responsible agent that

broke the chain of causation, so that the death could not be concatenated with the breach of the statute.

It is insisted, however, that the statute requiring druggists to label all poisonous substances does not apply to every substance that contains any amount of poison, regardless of the purpose for which it was intended, and that it does not apply where the substance is furnished on the prescription of a physician which does not call for such a label. The statute is, viz.: "Any person who sells and delivers any poisonous liquid or substance without having the word 'poison' written or printed on the label attached to the vial, box, or parcel in which the same is sold, shall, on conviction, be fined not less than twenty nor more than one hundred dollars." Shannon's Code, § 6745.

Does this statute apply to medicine containing any ingredient of poison, compounded upon the prescription of a physician, or is it to be limited in its operation to the sale of poisons in original form? It is in proof that a large proportion of medicines and druggists' compounds contain ingredients of poison, and it is argued that if all medicines containing poison, no matter how minute in quantity, must be labeled poison, nervous and excitable persons would refuse to take the remedy prescribed, for fear of the consequences, or, if taken, its therapeutic efficacy would be destroyed by the mental excitement and uneasiness thus aroused.

The question presented in respect of the proper

construction of this Act arose in the Common Pleas of Ohio on a similar statute. That Act provided that "whoever sells, or gives away, any poison, without first having marked the word poison upon the label or wrapper containing the same, . . . shall be fined," etc. The defendant in that case was a druggist, and was indicted for violating the statute in a sale of morphine, then and there contained in a certain bottle labeled "Mrs. Winslow's Soothing Syrup," without having the word poison on the label or wrapper containing said article. The Court said, viz.: "The construction given to this statute by the State, was that it prohibited the sale, without the label, "poison," of any quantity of morphine, whether the same was sold in a free state or in a mechanical mixture, or in the form of a proprietary medicine, or under prescription of a doctor, without regard to whether the mixture containing the poison was a medicine, or was poisonous or nonpoisonous."

"By the construction contended for, it would be impossible for the wit of man to conceive of the sale of any article belonging to the class usually denominated poison, in any quantity, however small, or in any sort of a mechanical combination, if unlabeled, without violating the statute. . . .

"The construction adopted by the Court below renders criminal millions of transactions that have occurred in Ohio during the past fifty years, and are occurring daily, for the prescription of every

physician, containing morphine or opium, or strychnine or arsenic, that is given as a medicine and that is filled by the druggist, would have to be labeled poison. If the mixture or medicine so sold contains so little of the poison the effects of which were beneficial and not injurious, the statute would still be violated. Every sale of many a remedy that has been in use for years would have to be stamped "poison." I instance Dover's powders and paregoric and syrup of ipecac. Others might be given. Is it possible that this statute is to be so construed that prescriptions of physicians and these ordinary remedies are to be labeled poisons? Clearly not.

"Wherever a statute admits of two constructions we are bound to presume that the Legislature intended to do that which is clear, manifest, and just. The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide in construction than the presumption against unreasonable inconvenience or injustice. The Legislature cannot be supposed to intend its own stultification. When, therefore, to follow the words of an Act leads to absurdity in its consequences, that constitutes sufficient authority to depart from them. Endlich, Interpretation of Statutes, Secs. 258–264.

"A construction leading to absurd consequences will be deemed not intended, and language will be restrained accordingly. 39 Ohio St., 651; 50 Ohio St., 661.

"The practical construction given to section 6957

for now nearly half a century has been directly contrary to the construction urged. Until this case was prosecuted no one ever thought that the law required the numerous prescriptions which druggists of Ohio have filled, containing morphine or other poisons, to be labeled as poisons, and a record to be kept, as required by this statute. It is a fact beyond dispute, that nearly one-third, at least fully one-fourth, of all the prescriptions given by physicians in Ohio contain poison, morphine and opium being common poisons prescribed. It is a fact, further, that these prescriptions, as a rule, contain more of such poisons, relatively, than the mixture sold by Marvin. There is scarcely a cough syrup prescribed by any physician which does not contain morphine or opium, or some other form of such poisons which is the equivalent of morphine, in an equal proportion or greater than that contained in this mixture. No one has ever construed this statute as prohibiting the sale of such mixtures as poisons. Dover's powders have been a well-known medicine and remedy for one hundred and fifty years. The dose of Dover's powder is from five to fifteen grains. If we take the middle dose, say ten grains, it is composed of one grain of opium, one grain of ipecac, eight grains of sugar of milk (U. S. Pharmacopœia, last edition). The United States Dispensatory gives one grain of opium ordinarily to be the equivalent of one-tenth of a grain of morphine. Therefore, a ten-grain Dover's powder contains exactly as much poison, the

equivalent of morphine, as an ounce of this mixture. The druggists of Ohio never construed this statute as requiring them to label Dover's powder a poison. Take another very common household remedy, paregoric. It is prescribed by the most eminent physicians. The pharmacopœia says that it is composed of opium, benzoic acid, camphor, oil of anise, alcohol, and glycerine. There are two grains of opium to every fluid ounce of the mixture. Therefore, every fluid ounce of paregoric contains the equivalent in poison of one-fifth of a grain of morphine, which is double the poison in an ounce of this soothing syrup. Has it ever been thought that the sale of paregoric by a citizen of Ohio, without labeling it poison, was a criminal act? Other instances could be given. These are all facts of common knowledge, and all proper for the Court to consider in giving construction to this statute. Courts will take judicial notice of facts of common knowledge. The conclusion reached is, that the statute in question is not a statute governing the sale of mixtures compounded as medicines, whether proprietary or prescribed by a physician, even though such medicines contain poisons in solution or in a free state.

"This is a statute regulating the sale of poisons, and it governs the ordinary and common transactions of people in the selling of poisons in Ohio, and does not apply to the selling of poison in harmless mechanical mixtures, or in proprietary mixtures that are beneficial medicines, or to poisons contained in

medicines prescribed by physicians for the cure of disease. It is never permitted, it is intolerable, to create offenses by mere construction." 50 Pa. St., p. 207.

We have thus quoted at length from the foregoing opinion, not that it is authoritative or controlling, but for the manifest good sense it contains, and as illustrating the *reductio ad absurdum* if the literalism of the statute should be followed. We cannot assent to the construction of the statute given by the Circuit Judge, and hold that it does not apply to medicines compounded by druggists upon the prescriptions of physicians. In this view, there is no evidence to support the verdict of the jury. The judgment is therefore reversed, and the cause remanded.

KELLY *v.* MOUNTAIN CITY CLUB.

(*Knoxville.* October 1, 1898.)

ATTORNEY FEES. *Not paid out of general fund, when.*

The solicitors of complainant in a bill to wind up the affairs of an insolvent corporation are not entitled to have their fees paid out of proceeds of real property to the detriment of first mortgage bondholders, notwithstanding that the proceeds of such property was paid into Court during the progress of the case, it appearing that the first mortgage bondholders, as such, were not interested in having the proceeds go into Court, although one of their number, who was also interested as a second mortgage bondholder and as a general creditor, consented that the suit be treated as a general creditors' bill.

Cases cited and approved: Garner *v.* Garner, 1 Lea, 30; Hume *v.* Bank, 13 Lea, 496; Keith *v.* Fitzhugh, 15 Lea, 49.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. MCCONNELL, Ch.

WILLIAMS & LANCASTER and COOKE, SWANEY & COOKE for Kelly.

STEPHEN & CARSWELL and WHITE & MARTIN for first mortgage bondholders.

WILKES, J. The only question in this case is whether the fees of complainants' solicitors are payable

out of the proceeds realized from a sale of the real property of the Mountain City Club, a social organization, wound up in this proceeding as an insolvent corporation. There is no contest as to the amount of the fees. They were fixed at $850, and the Court below held that no part of the amount should be charged up against the real estate of the club, or its proceeds, and the complainants appealed. The Court of Chancery Appeals affirmed the decree of the Court below, and held that no part of the fees should be paid out of the real estate. It appears that upon this real estate there is a first mortgage for $25,000. There is a mortgage for $10,000 upon the furnishings, etc., of the club, and this is also a second mortgage on the realty. Complainant, Kelly, is a holder of some of the latter bonds, and is also a general unsecured creditor of the club to a large amount.

The bill in this cause was filed to wind up the affairs of the club, alleging insolvency and setting out the assets and liabilities, and it was asked that it be taken and treated as a general creditors' bill and that a temporary receiver be appointed.

To this bill the club, as a corporation, and the Southern Bank & Trust Co., as trustee, and one Squair, were made defendants. Squair was a holder of some of the first mortgage and some of the second mortgage bonds. The club answered, admitting insolvency and agreeing to the proceeding.

On February 15, 1896, Bray and others, holders

of first mortgage bonds on the real estate, filed a cross bill, asking a foreclosure of their mortgage and sale of the real property for their benefit, and that their cross bill be treated as a general creditors' and bondholders' bill, and that a permanent receiver be appointed, etc.

April 26, 1896, Squair, who was a defendant to the original bill, joined with Kelly, complainant in the original bill, in filing an amended and supplemental bill, in which he insisted it was to the interest of all parties to have the affairs of the club wound up under one proceeding, and he asked that the amended and supplemental bill be treated as a general creditor's bill, and that permanent receiver be appointed. This bill at chambers was ordered to be treated as a general creditors' bill, and a permanent receiver was appointed under all the proceedings. The property was sold. The real estate brought $10,500. There are several thousand dollars of other assets. There was a reference as to the fees, reserving the question as to what funds would be liable for them. The amount of fees was reported and is not excepted to. Under the order of reference, much proof was taken to show that complainant's action in the whole matter was in the interest of the club and general creditors, and to the prejudice of the first mortgage bondholders.

Upon final hearing the Chancellor decreed as before stated, and the Court of Chancery Appeals has

affirmed his ruling, and the case is before us on appeal of complainants, and errors assigned.

The only error assigned is that the Court of Chancery Appeals erred in holding that no part of complainant's attorneys' fees should be paid out of the proceeds of the real estate sold, inasmuch as the amended and supplemental bill filed by Squair, who was a holder of first mortgage bonds, was ordered by the Court to be treated as a general creditors' bill, and the litigation was conducted on this idea. It is insisted, that, under this bill, the fund of $10,500 was brought into Court as the proceeds of the real estate, and complainant's solicitors are entitled to fees out of it. Several authorities are cited in support of this contention.

We are of opinion the error is not well assigned, and the decree of the Court of Chancery Appeals is correct. It is true the proceeds of the real estate came into Court in the progress of the cause, but not for the benefit of the general creditors. The first mortgage creditors were in nowise interested in having it go into Court. They could have realized it, without the aid of the Court, by a foreclosure outside of Court. The fact that general creditors, or second mortgage bondholders, caused the land to be sold in the case, so that the property might be kept together, was a matter wholly for their benefit, and really to the prejudice and delay of the first mortgage bondholders.

In winding up the affairs of the corporation, so

as to realize whatever of surplus there might be for their debts, the second mortgage bondholders and general creditors would have no right to require the first mortgage bondholders to contribute of their security to pay general creditors and attorney fees. These first mortgage bondholders had their own attorneys, and to them they are responsible for fees. It is evident that the interests of the second mortgage and general creditors were not the same as that of the first mortgage bondholders, but really antagonistic.

The real merits of the case is that the first mortgage bondholders should not be made to contribute to attorney fees to benefit second mortgage bondholders and general creditors when their interests are antagonistic, and informalities, if any, in the proceedings, should not be allowed to work a different result. The fact that Squair was a first mortgage bondholder, and joined in the amended and supplemental bill, can make no difference, since his position was clearly antagonistic to that of the large majority of first mortgage bondholders, and his interest under the second mortgage and as a general creditor may easily account for his position, and places him in antagonism, as it was in this latter capacity that his interests lay. This holding is well supported by authorities. *Garner* v. *Garner*, 1 Lee, 30; *Hume* v. *The Bank*, 13 Lea, 496; *Keith* v. *Fitzhugh*, 15 Lea, 49.

Let the decree be affirmed with costs.

IRVINE *v.* CHATTANOOGA.

(*Knoxville.* October 3, 1898.)

MUNICIPAL CORPORATIONS. *Not liable for negligence of fire department.*

The duty of a municipal corporation to extinguish fires is a public and not a corporate one, and an action will not lie against it for the negligence of the fire department in responding to a call for its services, and the rule is not changed by the fact that the expenses of the fire department are estimated each year in fixing the tax rate.

Cases cited: Memphis *v.* Kimbrough, 12 Heis.; 133; Pesterfield *v.* McVickers, 3 Cold., 205; Foster *v.* Water Co., 3 Lea, 48.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

THOMAS & THOMAS for Irvine.

CANTRELL & MCREYNOLDS for Chattanooga.

MCALISTER, J. The object of this suit is to hold the city of Chattanooga liable for the loss of a dwelling house by fire, which is alleged to have occurred in consequence of the negligence and inefficiency of the fire department. The fire occurred about ten o'clock on the morning of June 26, 1896,

and the dwelling was totally destroyed. It originated in the roof near the chimney, and, as soon as it was discovered, the plaintiff turned in an electrical alarm to fire hall No. 2, situated about two blocks distant. The fire department having failed to respond, a general alarm was given to all the fire halls in different portions of the city, but there was still no response. Plaintiff then undertook to reach the department by telephone, but was unsuccessful. In the meantime the fire had slowly spread to other parts of the building, and, notwithstanding the utmost exertions on the part of plaintiff, the house was totally destroyed. It seems reasonably certain, from this record, that if the fire company at hall No. 2 had responded, the flames could have been arrested and the property saved. The failure of the fire department to respond was due to the fact that on that morning it had been ordered on parade duty to attend the funeral of the city physician, which occurred about two miles distant from plaintiff's property, and in an opposite part of the city.

A demurrer was interposed on behalf of the city, which was sustained by the Circuit Court, and plaintiff's suit dismissed.

The principal assignment of demurrer was, that the duty to extinguish fires is a public and not a corporate one, and the city is not liable for the negligent failure of its officers, agents, and servants to extinguish fires. The general rule is, that the

neglect of duty for which an action will lie against a municipal corporation must be a plain, absolute duty, which pertains to the corporation as such, and from which it is to derive special benefit in its corporate capacity, and not merely such duties as it exercises for the benefit of the public. Dillon on Mun. Corp., Sec. 976, *et seq.* Says Judge McFarland, in *Mayor and Aldermen of Memphis* v. *Kimbrough*, 12 Heis., 133, viz.: "A municipal corporation is, upon the principle of *respondeat superior*, liable for the negligence of its officers and agents in the exercise of that class of powers conferred upon it not for public purposes only and as pertaining to its functions as a local government, exercising in that aspect a portion of the sovereign power of the State, but for its own corporate advantages and immediate emoluments."

It has been held in this State, upon the principle just stated, that no action lies against a city for the acts of its police officers, such as an assault and battery in the arrest of an offender, or the unlawful refusal of a Recorder to accept bail. *Pesterfield* v. *McVickers*, 3 Cold., 205. So, in a recent case decided at Nashville, this Court held no action would lie against a city for the negligence of an employe in charge of a sprinkling cart, whereby injury was occasioned to plaintiff's buggy. Dillon on Mun. Corp., Vol. II., Sec. 975. Again, at Sec. 976, the same author says: "So, although a municipal corporation has charter power to extinguish

fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not liable for the negligence of firemen appointed and paid by it, who, when engaged in their line of duty upon an alarm of fire, ran over plaintiff in drawing a hose reel belonging to the city on their way to the fire, nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department, nor for negligence when any sparks from the fire engine of the corporation caused the plaintiff's property to be burned.

"The exemption from liability in these and the like cases is . . . that the service is one in which the corporation, as such, had no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given. The maxim of *respondeat superior* has, therefore, no application."

In *Foster* v. *Water Co.*, 3 Lea, 48, this Court, in considering this subject, said, viz.: "The conclusion of the Courts has been not to press the pecuniary

liability of municipal corporations, which is distinctly recognized where the duty is a corporate one, absolute and perfect, and owing to an injured party, to cases where a duty is assumed, not for the corporate comfort, but for the common good.

"They have refused to hold the city liable for the acts of its police officers, although they are appointed by it, or for the acts and negligence of its agents and employes in charge of patients in a public hospital; for the misconduct of members of its fire department, or for the city's neglect to provide suitable engines or fire apparatus, or to keep in repair public cisterns or continue the supply of water to particular hydrants. The reason is that the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate, nor essential to the corporate existence, largely subserve the public interest. The supplying water for the extinguishment of fires is precisely one of these acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of a whole street of houses, as sometimes happens, because it might be thought, or because in reality some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk."

Plaintiff, however, undertakes to exempt this case from the operation of the general rule, upon the ground that a tax was especially levied to support

the fire department, and hence, there was an implied contract to furnish an efficient service for the extinguishment of fires and a corresponding liability on the part of the city for a breach of this duty. But, as is well argued, the health department, police department, the workhouse department, and others are supported by money raised for that purpose by taxation. In Chattanooga the expenses of the fire department are estimated each year in fixing the tax rate, just as the expenses of the police department are estimated.

The exemption from liability in this class of cases is rested upon the ground that powers of this nature conferred upon such corporations are public and governmental functions, and are not strictly corporate functions. The distinction may be a little metaphysical, and, at times, difficult of application, but it is well settled.

Judgment affirmed.

UNION TRUST CO. *v.* ELECTRIC RAILWAY

AND

BAYLEY *v.* ELECTRIC RAILWAY.

(*Knoxville.* October 5, 1898.)

1. MORTGAGES AND DEEDS OF TRUST. *Premature suit for foreclosure.*

A suit for foreclosure of a mortgage, brought after default, but within six months thereafter, is premature, and, therefore, fees cannot be allowed complainants and their counsel out of the mortgaged estate or its proceeds, where the mortgage provides that after six months continued default in payment of principal or interest, the trustee or mortgagee may take possession and operate the property and apply the net income to the interest and principal in default, and further provides that "upon default and entry as aforesaid, or without such entry," there may be foreclosure by suit or otherwise. (*Post, pp. 298–305.*)

Cases cited: Clark *v.* Jones, 93 Tenn., 642; Irvine *v.* Shrum, 97 Tenn., 263; 106 U. S., 47; 60 Fed. Rep., 543; 139 U. S., 137; 27 Fed. Rep., 151.

2. SAME. *Same.*

The rule that there is an immediate right of foreclosure by Court proceedings, upon default in payment of interest on a mortgage, yields to a reasonable stipulation in the mortgage for a delay of foreclosure proceedings for a reasonable time after maturity of an interest installment. (*Post, pp. 301–305.*)

3. TIME. *Computation.*

"Within" or "after" a certain time, embraces the last day of the time limited. (*Post, pp. 300, 301.*)

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. MCCONNELL, Ch.

SKIPWITH WILMER and WHEELER & MCDERMOTT for Trust Co.

BROWN & SPURLOCK for Railway Co.

BARR & MCADOO for Bayley.

WILKES, J. These two causes are proceedings to foreclose mortgages of the Chattanooga Electric Railway Co. because of default in payment of interest coupons. The suits were brought within two months after the coupons matured. Before the lapse of six months after maturity, but after the bills were filed, the defendant company paid all interest in default.

As the cases come to us, two questions only are presented: (1) Whether the bills were prematurely filed; and (2) whether the trustee in the first cause should be allowed compensation for himself and counsel; and, in the second case, whether the counsel of complainants should be allowed fees, the trustee in the latter case having failed, and being unable to act, and the suit being brought by the bondholders, who are beneficiaries under the trust.

The first assignment presents a question of difficulty, and its solution depends upon the proper construction of the provisions of the mortgages as to the remedies of the trustee or beneficiaries in case of default in payment of the interest coupons at maturity.

The provisions of the mortgage in the first case are substantially, so far as need be stated, "that if

default is made in payment of any interest, etc., the mortgagor covenants and agrees that within six months after such default shall have occurred, the same default still continuing, it will, on demand of the trustee, give possession to him or his agent of all the mortgaged property, and he may operate the same and receive the income and profits, and, after paying expenses, pay the interest in default," etc.

It is further provided by the next section, that if default shall be made as aforesaid, and shall continue as aforesaid, the trustee, after entry as aforesaid, or other entry, or without entry, by itself or agent, or by proceeding in Court, may sell the property, etc., and pay the proceeds on said interest and on the principal of said bonds, whether due or not.

The provisions of the mortgage in the second case are, that if default is made in payment of principal or interest, and if such default continue for six months, the mortgagee or trustee may take possession and proceed to operate, and, after paying expenses, pay the interest and principal and may sell the property, etc. It further provides, "upon default and entry as aforesaid, or without such entry, the party of the second part may proceed to sell the mortgaged property, either by virtue of the power of sale herein contained, or by proceeding in a Court of Equity, in the manner and for the purposes herein mentioned," etc.

The question of controversy in the case is, whether the mortgagor company, under these provisions, has

six months after default in which to pay interest before any steps can be taken to foreclose, or whether the right to foreclose by Court proceedings is immediate upon the default. The Court of Chancery Appeals held the latter view, and therefore concluded that the suits to foreclose were not premature, and, as a result, the complainants were allowed counsel fees (and trustee's compensation in the last case). They base their conclusion on the holding of the Court in *Railroad* v. *Fosdick*, 106 U. S., 47; *Guaranty Co.* v. *Railroad Co.*, 139 U. S., 137; *Farmers' Loan Co.* v. *Railroad Co.*, 61 Fed. Rep., 543.

The identical same cases are relied on by appellant to sustain a contrary view, and are urged by appellee to sustain the Court of Chancery Appeals.

As an original proposition, free from any controlling or persuasive authority, we would hold that a proper construction of each mortgage is, that it is not until after default in payment of interest had continued for six months, that foreclosure proceedings or other proceedings to take possession could be had either in or out of Court. Upon any other construction we are unable to give any force or effect to the words "within six months," contained in one mortgage, and "if such default continue for six months" in the other. "Within" a certain time embraces the last day of the time limited, as does the word "after." 29 Am. & Eng. Enc. L., 524; 26 Am. & Eng. Enc. L., 4; 1 Am. & Eng. Enc. L., 323. If the provision that "within six months

after default, it still continuing," does not mean that the mortgagor shall have the six months after default for breathing time to make good the default, we can see no rational meaning to attach to it. It could have but one other meaning, and that is, that the possession and foreclosure proceedings may commence at once, but must begin within six months or not at all—a construction which would lead to absurd consequences. Take the illustration put by counsel for complainant, of a note or bond payable within six months. This would clearly mean that the maker would have the whole of six months in which to pay, and so it has been held. 29 Am. & Eng. Enc. L., 524, note. If it was intended that a right of immediate entry should be had, why put in the six months limit, and why not provide, in plain terms, that if default is made, the trustee may at once or forthwith enter and proceed to foreclosure. This would be the result if no limit was made in the mortgage. Why, then, is six months mentioned unless it was to give that time to make good the default?

So, in the other mortgage, the entry and foreclosure are to take place, and Court proceedings may be had, if such default continues six months. If it do not continue for that time, the right of entry and foreclosure, in or out of Court, has not accrued under the terms of the mortgage.

But it is said the right to go into Court, and foreclose on default, does not depend on the provis-

ions of the mortgage, and that there is an immediate right of foreclosure by Court proceedings in all such cases upon default made. Grant this to be so in cases where it is not otherwise provided (as the decisions hold), still, when the time when the entry is to be made, and foreclosure commenced, is prescribed by the mortgage, that will control, in the absence of some superior equity. The jurisdiction and power of the Chancery Court to foreclose and execute trusts cannot be taken away from it, even by agreement, express or implied, nor is it cut off by mere silence on the subject; but when parties make a reasonable stipulation in the mortgage that it shall be foreclosed only on certain conditions and in certain contingencies, this stipulation will be respected by the Courts, unless there arises some unexpected and overriding occasion to demand the aid of the Court to preserve the property or the rights of the parties. While there are cases, some of which are cited by counsel, holding more or less strictly a contrary view, this is in accord with the rulings of this Court in similar cases. *Clark* v. *Jones*, 9 Pick., 642; *Irvine* v. *Shrum*, 13 Pick., 263.

We do not understand the case of *Railroad* v. *Fosdick*, 106 U. S., 47, to be in conflict with this view. In that case the provisions are very similar to those now under consideration, and the Court does say that upon default in payment of any interest the trustee or any bondholder may file a bill to foreclose, but the Court was evidently

speaking of the right to file such a bill and not, in that immediate connection, of the time when it might be filed. See p. 54, L. R. A. Edition bottom page.

But just prior to this the Court says the condition of the mortgage was broken, and, continuing for six months, entitled the trustee to take possession and sell, etc. See same page, near middle.

In that case, moreover, the interest had been in default from October, 1873, to February 27, 1875, before the bill was filed, so that the questions of time and prematurity of suit were not material and really not considered.

It will be noted, also, that in the Fosdick case the provision of the fourth article of the mortgage, as stated by the Court, was that the mortgagor's right of possession was to terminate upon a default in the payment of interest as well as principal, while in the mortgages now under consideration the clear intent is that the mortgagor is to remain in possession until the termination of the six months and until demand is made.

The rule is, we think, correctly stated in general terms in *Farmers' Loan & Trust Co.* v. *Chicago, etc., Ry. Co.*, 27 Fed. Rep., 151, substantially as follows: "When the trustee may proceed to foreclose on account of default depends on the construction of the mortgage. It is generally held that the right exists to proceed at once unless it appears from the terms of the mortgage to be the intent of the parties to postpone the right."

The case of *Guaranty Trust Co.* v. *Green Cove Springs Co.*, 139 U. S., 137, is in accord with this view. In that case the mortgage provided that the trustees should take possession and sell after default for a time stated, but made no mention of foreclosure proceedings in any Court, and there was no provision therefor, and it was held that the limitation did not apply to Court proceedings to foreclose, nor to judicial sales, but only to foreclosure in the mode provided in the mortgage, and that the right to Court foreclosure exists, though not provided for in the mortgage. The general rule is, that when no provision is made for Court foreclosure it may be had at any time after default, although proceedings out of Court may be provided for differently in the mortgage, and the converse of the rule is equally good, that when Court foreclosure is provided for in the mortgage it is a stipulation that the Court may be resorted to only upon the terms and at the time provided in the mortgage.

The mortgage in each of the cases now under consideration provides for a sale under Court proceedings at the same time and on the same conditions that sale may be made out of Court, and under such provisions it is the clear intention of the parties that the Court proceedings should be had only in like cases and conditions where foreclosure might be had out of Court, and we do not think the provision for Court foreclosure can be treated as simply and alone in aid of proceedings out of Court.

We are of opinion that under the provisions of these mortgages there is no right to foreclose for mere default, either in or out of Court, until after default has been continued for six months, and until demand made, the demand being an additional prerequisite and not affecting the time limit, and the suits were prematurely brought, therefore, and the defendant should not be onerated with the compensation of the trustee or his counsel, or counsel for the bondholders, and the decree of Court of Chancery Appeals is therefore reversed.

Costs of the appeal and of the Court below will be paid by the original complainants and their sureties on their prosecution bond, and the bills are dismissed. In this view we need not consider the second assignment.

TYLER *v.* WALKER.

(*Knoxville.* October 5, 1898.)

1. ATTORNEYS' FEES. *Provision in note for.*

A provision in a note for the payment of attorneys' fees and cost of collecting is valid, where suit is necessary and brought in good faith, if the stipulation is not a device to cover up and collect usury, but such fee is not collectible when such suit is needlessly brought, or when it is brought to enforce an unjust demand, or to coerce more than is actually and justly due. (*Post, pp. 308, 309.*)

Cases cited: Parham *v.* Pulliam, 5 Cold., 497; Clark *v.* Jones, 93 Tenn., 643; 6 Am. Rep., 663; 38 Am. St. Rep., 100; 141 U. S., 406; 40 Mich., 517; 81 Ala., 489.

2. SAME. *Same.*

Plaintiff in an action to foreclose a deed of trust, to secure a note stipulating for an attorney's fee in case of suit, is not entitled to recover such fee, where he refuses to credit the defendant upon the principal with usurious payments, under the erroneous impression that the claim to have them so credited is barred by the statute of limitations. (*Post, pp. 309, 310.*)

3. COSTS. *Paid by plaintiff suing on usurious note.*

Plaintiff in an action to enforce a deed of trust securing a note, is properly charged with costs, where his unfounded claim to retain all usurious payments made more than six years before the commencement of the suit without applying them to the principal, was the cause of the litigation. (*Post, p. 309.*)

Code construed: § 4947 (S.); § 3930 (M. & V.); § 3205 (T. & S.).

Case cited: State *v.* Lewis, 10 Lea, 168.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. MCCONNELL, Ch.

Tyler *v.* Walker.

J. H. McLean for Tyler.

Pritchard & Sizer for Walker.

Wilkes, J. The original bill in this case was filed to enjoin a foreclosure of a deed of trust. It alleged that the complainant had tendered the amount due under the deed of trust, but that defendant had collected usury, and was demanding more, and seeking to collect a larger sum than was justly owing. Defendant answered, and denied that tender had been made, and said that he was aware he could only collect the proper amount owing, without usury. He filed a cross bill, and asked that the deed of trust be foreclosed for such amount, and an attorney fee, as stipulated in the deed of trust, and also for another attorney fee which had been incurred in some negotiations for an extension of time. On demurrer to the cross bill, it was dismissed as to this latter fee of twenty-five dollars. On final hearing, the Court found the amount due, and held that while a tender had not been made, still defendant was attempting to foreclose his deed of trust for more than was legally due; that the bill was therefore properly filed to enjoin the sale; and that defendant, under the facts, was not entitled to recover any attorney fees, but must pay all the costs except that of the sale. There was a decree of sale, and the property was sold, and bought by defendant, but, before the confirmation, complainants paid off the judgment and interest, and such costs as were

adjudged against them, whereupon the sale was set aside. From so much of the decree as adjudged costs against him, and denied him attorney fees, defendant appealed, and also appealed from the decree on the demurrer refusing the twenty-five dollars attorney fee. The Court of Chancery Appeals affirmed the decree of the Chancellor, and complainant has appealed to this Court, and assigned errors.

The only errors assigned in this Court are that the defendant was improperly required to pay all the costs except those incident to a sale of the property, and was denied an attorney's fee for collection of the note by suit. The provision in the note as to fees is this: "We further agree that if suit is brought on this note, we will pay all attorneys' fees and costs of collecting." The note was signed by Tyler and wife, but it is doubtful, from its language, whether the mortgage recognizes this provision as to attorneys' fees as a valid charge on the property for which a sale may be had. It does not do so in express terms, but perhaps by implication does, and we so treat it.

It is not denied that this provision is a valid and legal one in cases where suit is necessary and brought in good faith, and the stipulation is not a device to cover up and collect usury. This is well settled. *Parham* v. *Pulliam*, 5 Cold., 497; *Weatherly* v. *Smith*, 6 Am. Rep., 663; *Clark* v. *Jones*, 9 Pickle, 643. But such fee is not collectible when suit is needlessly brought, or when it is brought to enforce an unjust de-

mand or to coerce more than is actually and justly due. *Clark* v. *Jones*, 9 Pickle, 643; *Boyd* v. *Jones*, 38 Am. St. Reps., 100. The authorities construe strictly in favor of the debtor all similar provisions as to attorneys' fees. *Fowler* v. *Trust Co.*, 141 U. S., 406; *Meyer* v. *Hart*, 40 Mich., 517; *Bynum* v. *Frederick*, 81 Ala., 489; 26 Am. & Eng. Enc. L., 965.

It clearly appears from the holding of the Chancellor and the findings of the Court of Chancery Appeals, that the defendant was attempting to foreclose his trust deed for an amount which embraced usury, and was greater than was legally owing, and that while defendant, in his cross bill, disclaimed any right of recovery for any amount beyond legal interest, still, in it he was not willing to give credit for such payments of usury as he incorrectly thought were barred by the statute of limitations. The cross bill was, moreovor, unnecessary, as the trust deed could have been enforced out of Court for the amount legally due. As to the costs, we are of opinion this question is settled by the statute (Shannon, § 4947), which is as follows: "If it be made to appear in the action that usurious interest has been intentionally taken or reserved, the person taking or reserving such usury shall pay full cost."

It is clear, from the findings of the Court of Chancery Appeals, that the defendant did collect and reserve usurious interest, and that he sought to retain all the usury paid more than six years before

the litigation began, and the whole litigation in this case arose out of the usury claimed. We cannot see that the Chancellor or the Court of Chancery Appeals was in error in thus holding as to costs, and even if it be held a matter of discretion, this Court could not reverse unless there was a clear abuse of such discretion. *State* v. *Lewis*, 10 Lea, 168.

We see no reversible error in the decree of the Court of Chancery Appeals, and it is affirmed with costs.

Young *v.* Insurance Co. and Young *v.* Crozier.

YOUNG *v.* INSURANCE CO.

AND

YOUNG *v.* CROZIER.

(*Knoxville.* October 5, 1898.)

1. WILLS. *Gives wife life estate with power to sell and reinvest.*

Under a will which, though indefinite and informal, manifests intention to make a devise to the testator's wife, and provides that she is to have full and complete control of the property, with the right to transfer or otherwise dispose of the same, and that, upon her decease, the property or the proceeds thereof shall become the property of his daughter, the wife takes a life estate, with remainder to the child, with power in the wife, however, to sell and reinvest. (*Post, pp. 312–314.*)

2. SAME. *Purchaser's duty as to application of proceeds of land sold under power.*

A *bona fide* purchaser of lands, at a fair price, sold pursuant to a power in a will authorizing the sale for reinvestment, is not bound to see to the application or reinvestment of the proceeds. (*Post, p. 317.*)

Cases cited: 15 Gratt., 11; 62 Tex., 356; 69 Mo., 520.

3. DEED. *Held to be valid execution of a power to sell.*

A deed purporting to convey the fee, executed by the owner of a life estate, with a power of sale of the remainder, will be deemed an exercise of the power of sale, although there is no recital to that effect therein, and it appears that the grantor supposed that she owned the fee, and that she was conveying only her own title. (*Post, pp. 314–317.*)

Cases cited: Bradley *v.* Carnes, 94 Tenn., 27; Gee *v.* Graves, 2 Head, 238; 1 Story, 426; 134 U. S., 572; 11 Am. St. Rep., 420;

Young *v.* Insurance Co. and Young *v.* Crozier.

11 Ohio St., 277; 68 Me., 100; 64 Mo., 77; 94 Ind., 228; 91 Ind., 221; 46 Am. St. Rep., 591; 34 Am. Rep., 136.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. McConnell, Ch.

Dickey & Peeples for Young.

Bloom & Boddy for Insurance Co.

E. Watkins for Crozier.

Wilkes, J. These causes, heard at different times in the Court below and in the Court of Chancery Appeals, involve the same questions of law, and have been heard together in this Court. The facts, so far as necessary to be stated, are that W. C. Young made his last will and testament in these words:

"I, W. C. Young, farmer and fruit grower of the Fifth Civil District of Hamilton County, Tennessee, make this, my last will. I give, devise, and bequeath my estate and property, real and personal, as follows: That is to say, my farm, located on Mission Ridge and described and bounded as follows: On the north, east, and west by the lands of T. D. Dodds, on the south by the lands of N. Huddle,

and containing nine and one-third acres, and fully described in a deed given by D. T. Dodds to me, bearing date October 27, 1883. I also give, devise, and bequeath all my personal property and effects. I also devise and wish my wife, S. J. Young, to have full and complete control, to transfer and re-invest or otherwise dispose of the property, or any part of the same, as she may wish. I further desire that at the decease of my wife the property, as above described, or the proceeds thereof, shall become the property of my daughter, Essey May Young. I appoint my wife, S. J. Young, sole executor of this, my last will and testament . . . August 17, 1885."

The complainant was an infant two years old when her father died, and her mother soon afterward remarried and has sold the real estate mentioned in the will, and the defendants hold under title from her. The real question presented in each case is the proper construction of the will, and the power of the widow and mother, thereunder, to dispose of the real estate. In each case the Court of Chancery Appeals held that the widow of W. C. Young took a life estate in the land, with remainder to her child. Hence she could not convey the lands as a fee simple owner. In the first case, the Court of Chancery Appeals held that the sale and conveyance by the widow was not a valid execution of the power conferred by the will, taking the statement of the bill as true on demurrer, and, in the second case, that

the conveyance was a valid execution of such power as a matter of law and judicial construction.

The errors assigned are, in substance, that the Court of Chancery Appeals should have held that the widow took an absolute estate in fee in the land under the will. We are of opinion there is no error in this holding. Taking the whole instrument together, while it is indefinite and informal in not naming the devisee, it was clearly a devise to the wife, with remainder to the child, with power in the mother, however, to sell and reinvest. Upon this branch of the case we need not dwell. This is not in conflict with *Bradley* v. *Carnes*, 10 Pickle, 27, as is argued.

The second assignment raises the question whether the sale and conveyance by the widow were valid executions of the power to sell given in the will, conceding that the widow has a life estate with remainder to the child. The defendants are in possession of the lands, and so far as the proof shows, are innocent purchasers unless they are rendered otherwise by the recitals in the will and deeds.

It is insisted that a will or deed claimed to be in execution of a power ought to show expressly upon its face that it is executed in pursuance of the power. We have no direct adjudication on the precise question in this State.

In the case of *Gee* v. *Graves*, 2 Head, 238, 243, it was suggested that it was not necessary to the due execution of a power that it should be recited

or expressly referred to; that the intention to execute it would become manifest by such description or notice of the estate or property, the subject-matter of the power, in the conveyance, as would show that it included something that the party did not have otherwise than under the power, and that the conveyance would be wholly inoperative unless applied to the power, but the question was expressly reserved.

The leading case out of the State is *Blagg* v. *Mills*, 1 Story, 426. In that case it was held that it was not necessary that the intention to execute the power should appear by express terms or recitals in the instrument, but that it must appear by words, acts, or deeds demonstrating the intention. Judge Story lays down three classes of cases which have been held to indicate a sufficient intention to execute the power: (1) When there is some reference in the will or other instrument to the power; or (2) a reference to the property which is the subject of the power; or (3) when the instrument executed would be ineffectual and a nullity, and could have no operation except as an execution of the power. This case is approved and followed in *Lee* v. *Simpson*, 134 U. S., 572, and the rule is said to be supported by a great weight of authority, and many cases are cited.

In *Terry* v. *Rodahan*, 11 Am. St. Rep., 420, it was held that when the deed described the property which was the subject of the power, it would oper-

ate as an execution of the power although the grantee supposed himself to be the owner of the property, and that the conveyance would be simply a transfer of his own title.

In *Bishop* v. *Remple*, 11 Ohio St. Rep., 277, there was a reference to the property, but none to the power, and it was held that the terms of the deed could not be satisfied except they be treated as an execution of the power.

In *Hall* v. *Preble*, 68 Me., 100, it is said: "It is not necessary that there should be an express declaration in the deed that it is made in execution of the power, it is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it." See, also, *Owen* v. *Ellis*, 64 Mo., 77; *Campbell* v. *Johnson*, 65 Mo., 439; *Douney* v. *Buennagel*, 94 Ind., 228; *South* v. *South*, 91 Ind., 221; 46 Am. St. Rep., 591; *Funk* v. *Egglestone*, 34 Am. Rep., 136.

It is urged that the mother understood herself as owning the fee in the land, and conveyed under this impression, and not intending to execute a power, but this would be immaterial under the authorities already cited. *Terry* v. *Rodahan*, 11 Am. St. Rep., 420, and other cases cited. And this is in accord with the theory of conveyancing under our laws, that the grantor parts with whatever and all of the

title he has or can convey, unless a contrary intention appear.

It is said, or rather suggested, that it was the duty of the purchaser to see to the application or reinvestment of the proceeds, but such is not the law. *Davis* v. *Christian*, 15 Gratt., 11; *Cooper* v. *Homer*, 62 Tex., 356; and *Kinney* v. *Matthews*, 69 Mo., 520, where a special form of investment was directed and the rule was nevertheless maintained. In the present cases it appears that the property has been sold for a fair price. The wife made a warranty deed. The deeds referred to the will as the source of title. The property is described as in the will, and the deeds can only take effect according to their terms, by treating them as executions of the power and conveying the estate which, under the will, the widow or mother was authorized to convey. It thus falls clearly within the rules laid down by Mr. Justice Story.

The decree of the Court of Chancery Appeals in No. 35 is therefore reversed, and in No. 61 is affirmed. The original complainant will pay costs of both suits, and they are dismissed.

MANUFACTURING CO. *v.* WEATHERLY.

(*Knoxville.* October 5, 1898.)

1. STEAMBOATS. *Enforcement of lien for machinery and outfit.*

The failure to make demand for payment, as required by statute, before instituting a suit to enforce a lien on a steamboat for machinery and outfit furnished on the order of its master, is a good defense, and may be relied on in the answer, and need not necessarily be raised by demurrer or plea in abatement. (*Post, pp. 319–321.*)

Code construed: §§ 5313, *et seq.* (S.); §§ 4293 *et seq.* (M. & V.); §§ 3550 *et seq.* (T. & S.).

Cases cited: Pigue *v.* Young, 85 Tenn., 263; Robinson *v.* Grubb, 8 Bax., 19; 12 L. R. A., 355, note.

2. PETITION TO REHEAR. *Properly refused, when.*

Petition to rehear for the sole purpose of supplying facts that were omitted, without excuse, from the record upon which the case was tried, is properly refused. (*Post, pp. 321, 322.*)

3. MECHANIC'S LIEN. *Waiver of.*

An agreement to give credit for part of the contract price, beyond the life of a mechanic's lien, coupled with the retention by the furnisher of title to the property furnished, waives the right to the statutory lien, and the owner's default to comply with the contract does not restore the right to a lien. where such failure was due, in part at least, to the furnisher's fault. (*Post, pp. 321–324.*)

Cases cited: 9 Peters, 345; 21 L. R. A., 859, and note; 16 Bradw., 450.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. MCCONNELL, Ch.

PRITCHARD & SIZER for Manufacturing Co.

CHAMBLISS & CHAMBLISS for Weatherly.

WILKES, J. The original bill in this cause was filed to establish and enforce a lien upon the steamboat "Plucky City" for the cost of certain machinery and outfit furnished the boat on the order of its master. An attachment was levied on the boat and it was replevied by defendant on giving the bond required.

As the case comes to this Court from the Court of Chancery Appeals the questions presented are, first, is the suit fatally defective for the purpose of enforcing the lien, because there is no proof that a demand for payment was made before suit was brought under § 5313 *et seq.* of Shannon's Code? These sections provide the manner in which the application shall be made to enforce the lien, and, among other things, prescribe that the petition shall state that demand for the amount claimed has been made of some one of the defendants, or of the captain or agent of the defendants, being at the time in the county.

The petition alleged that such demand was made, but this was denied by the answer, and there is no proof on the point in the record as now made up. The Court of Chancery Appeals was of opinion that this objection could only be taken advantage of by plea in abatement, and not by setting it up in an answer upon the merits. It was of opinion that the

statutory lien arises under the provisions of § 3547 of Shannon's compilation, and the existence and continuance of the lien in nowise depends on the question whether demand is made or not; that demand is a provision made by the statute prescribing the manner of enforcing the lien, and not relating to its creation; that application to enforce the lien under the statute would be premature until the demand had been made, and if the petition had failed to state such demand, it would have been subject to demurrer or dismissal on motion, and the attachment might properly be discharged. But when demand is alleged, the remedy of defendants would have been to plead that it had not been, in fact, made; not as a denial of the lien, but as a defense that the complainant was not proceeding to enforce the lien as the statute prescribes. The defendants did not take this course, but first demurred to the jurisdiction on other grounds, then answered on the merits, either of which, it was of opinion, was a waiver of the right to abate by plea. We are of opinion that the defense of prematurity of suit may be relied on in the answer. Gibson's Suits in Chancery, Sec. 268; *Pigue* v. *Young*, 1 Pickle, 263; *Robinson* v. *Grubb*, 8 Bax., 19.

At common law and under the Codes where a statute gives a new remedy and prescribes prerequisite conditions to its enforcement, the performance of these conditions must be alleged and

proven. Enc. Pleading & Practice, Vol. 4, 655; *Gallup* v. *Smith*, 12 L. R. A., 355, note.

We are unable to see why these rules do not apply and govern the present case. The demand is by the statute made a prerequisite to the enforcement of the lien, and, unless such demand is both alleged and proven, the right to enforce does not exist. It appears that the original file of papers in the case was destroyed, and the record was supplied in an imperfect and only partial manner. From this supplied copy it does not appear that any demand was made. After the Chancellor rendered his opinion complainant presented a petition to rehear and to be allowed to prove that repeated demands were made before suit was brought, and that the original record so showed, and it was stated that complainant's solicitors thought the fact appeared in the supplied record, until after the trial was had, and they were thus taken by surprise, and leave to supply and make proof was asked. The Chancellor refused to grant this petition, and the decree recites that he based his refusal upon the ground that if the facts set out in the petition appeared in the record, it would not change the holding of the Court, or entitle the complainants to enforce a lien.

From this refusal to grant a new hearing, and on other grounds, the complainant appealed, and this they assigned as one of the errors in the Court of Chancery Appeals. The Court of Chancery Appeals,

under the view it entertained of the case, declined to pass upon the question whether the Chancellor correctly refused this petition to rehear, so that the matter is not brought directly before us by any assignment. It becomes material, however, in the view we have taken of the case, to consider it. We do not think the application to rehear should have been granted. The parties had made up the record and gone to trial upon it, and the petition to rehear is, in substance, asking to be allowed either to prove facts not shown by the evidence originally, or to show that the record, as supplied, failed to state facts that appeared in the original record. This would be to allow two trials in a case, the second based upon an omission to have a perfect record in the first trial. If this practice were allowed, there would be but few cases in which a rehearing could not be had, because the losing party frequently neglects some items of proof necessary for his case. We think it is not, moreover, a case which this Court can remand for a new trial under the provisions of the statute (Shannon, § 4905).

We are also of opinion that the other assignment is well taken, and that the Court of Chancery Appeals should have ruled that there was waiver of the lien under the facts of this case. It appears that by the terms of the contract, the price of the work was $917.55, subject to be increased by extra work or materials. Three hundred dollars of this amount was to be paid in cash, and a note for

$617.55, payable ninety days after date of completion of boilers and fixtures, was to be given, and title to the boiler, fixtures, and heater was retained to secure payment of the purchase money. The insistence is that this contract created or prescribed a security different from the statutory lien and was a waiver of it. The Court of Chancery Appeals was of opinion, that, inasmuch as the $300 cash was not paid, and the note for $617.55 was not given, therefore, the complainant would no longer be bound by its contract, but would be remitted to its statutory rights and remedies. The fallacy in this, is, we think, in ignoring the fact that the defendants were damaged in the work by complainants, $400, as found by the Chancellor, so that there was no cash due. As to the note for $617.55, there is no proof that this was not given, this being another one of the facts omitted to be shown by the supplied record, and in addition, the entire sum of $617.55 would not be owing, but only the amount less the balance of damages. Even if the note was not given, we can see no ground to hold that the complainants would not still be entitled to retain the title for the amount actually owing. The agreement to give credit for $617.55 beyond the time within which the lien by statute might be enforced, coupled with the retention of title to the property, indicates a waiver of the statutory lien, and precludes a reliance upon it, or the right to enforce it, and gives the complainant a different

remedy, to wit, that provided by statute when title is retained to secure purchase money. Jones on Liens, Par. 1519, 1535, 1536, and authorities there cited; Phillips Mechs. Liens, Par. 117, 276, foot of page 483; *Grant* v. *Strong*, 21 L. R. A., 859, and note; *Peyroux* v. *Howard*, 9 Peters, 345.

It cannot be said that the defendant in this case is in such default as to preclude him from insisting upon his contract, and to prevent him from insisting upon the waiver of the statutory lien. It appears, from the Chancellor's finding, that the default has been occasioned, in part at least, by the failure of the complainant to comply with its contract, and in such case the complainant is not entitled to be remitted to its statutory remedies and rights. Jones on Liens, Par. 1536; *Simon* v. *Blocks*, 16 Bradw., 450.

The decree of the Court of Chancery Appeals is reversed, and decree of the Chancellor sustained, and bill dismissed (so far as it seeks to enforce a lien) at complainant's cost.

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HOPE *v.* HAMILTON COUNTY.

(*Knoxville.* October 5, 1898.)

COUNTY. *Not liable to Justices for value of services, when.*

A county is not legally liable to a member of its County Court for services performed, as member and chairman of a committee appointed by that body to superintend certain jail and court-house improvements, as the services, if classed as ordinary, are paid for by the ordinary compensation allowed by law to Justices of the Peace; and, if classed as extraordinary, members of the Court are forbidden, by statute. to take contract or receive compensation for their performance.

Act construed: Acts 1869–70, Ch. 92.

Code construed: §§ 1133, 1134, 1135 (S.); §§ 1000–1002 (M. & V.); §§ 811 *a*, *b*, *c* (T. & S.).

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. McCONNELL, Ch.

RICHMOND, CHAMBERS & HEAD and THOMAS & THOMAS for Hope.

C. R. EVANS and COOKE, SWANEY & COOKE for Hamilton County.

WILKES, J. This is an action by the complainant to recover for services rendered Hamilton County

in superintending the extension and improvement of the courthouse and yard and jail of the county. The Chancellor gave judgment for complainant for one thousand dollars, and some interest and costs, and the county appealed, and assigned errors. The Court of Chancery Appeals reversed the Chancellor, and refused any recovery, and dismissed complainant's bill, and he has appealed, and assigned errors.

The facts, so far as necessary to be stated, are that, in 1890, Hamilton County determined to make extensive improvements upon its courthouse, jail, and grounds, the work to cost many thousand dollars. A building committee was appointed of the members of the County Court, and complainant was its chairman. There was no agreement made for any compensation to the chairman or any member for his services on the committee. Some outside conversations were had with the Judge and members of the County Court to the effect that compensation would be paid. An architect was employed to oversee the construction and improvements. It appears that he was negligent and inattentive, and that the complainant gave much time and service in looking after the improvements, for a part of the time giving it his undivided attention and entire time.

In January, 1896, at complainant's instance, a special committee was appointed to report what his services were worth. This committee reported the facts in some detail, and that complainant should have five hundred dollars for his services. The Quarterly

Court adopted this report, but, upon a subsequent day of the term, reconsidered their action, and rejected it. This suit was thereupon brought. The Chancellor thought complainant entitled to recover, and referred the matter to the Master to report the amount. He reported one thousand dollars as the proper amount, and this was confirmed by the Court, without exception as to the amount.

There can be no doubt of the great value of complainant's services in this case, and of the benefit received by the county, but the difficulty is in finding any ground upon which to rest a legal liability against the county. It is clear, in this case, that if complainant was not a member of the County Court, but had been employed or authorized as a private individual to do this service by it, the law would imply a promise to pay what the services are worth. Complainant cannot, however, claim in this capacity, since he clearly served throughout as a member of the Court, appointed on one of its committees, and selected as the head or chairman of that committee.

It cannot seriously be insisted that a mere appointment of one of its members upon a committee by the County Court, and service on that committee by the member, even though the service be onerous and beneficial, carries with it any legal right to compensation. In any event, the matter of compensation is one which, if compensation can be given at all, which we do not hold, addresses itself to the

sense of justice and discretion of the body appointing the committee.

There is a practice prevailing in the County Courts of appointing committees, as they are styled, to look after important business transactions. There is no statute authorizing it, and it is in no sense the creation of an office. At most it is but a designation of certain individuals to look after the matters committed to them, but they do this as members of the County Court, and not as its employes. Every person who becomes a member of the Court does so knowing that he may and probably will be called on to perform such services. Whether, as a matter of public policy, the Court might stipulate to pay for such service we need not now consider, as that question is not pressed before us.

In this case it appears that the services performed by complainant were doubly onerous and greatly more beneficial because of the negligence of the architect, but this cannot alter the rule. It does not appear that complainant ever brought notice of this fact to the Court, which he might have done, and thereupon, no doubt, secured an order to meet the exigency. It clearly appears that he rendered faithful services, relying upon the Court to remunerate him, while, for its own reason, it did not do so.

We do not consider it necessary to review the large number of cases cited by the Court of Chancery Appeals and by counsel, as we are of opinion

the rule governing the case is almost elementary, and can be but little aided by citation of authorities.

The case of *City of Ellsworth* v. *Rossiter*, 46 Kan., 237, is strongly relied on for complainant. In that case the city appointed a committee to establish and erect waterworks. One Rossiter was on the committee. No compensation was provided, and he brought suit for his services. He was a civil engineer. It does not appear that he was a member of the City Council. The Court held, in substance, that he was not a public officer within the rule which gives no compensation to such officer except as provided by law, but was rather an employe of the city, and gave judgment.

In *Leavenworth* v. *Brewer*, 9 Kansas, 210, a County Attorney on salary, was, at the instance of the County Commissioners, sent beyond the limits of the county to attend to a suit for the county, and the county having refused compensation, he sued for it and recovered. In this case the service was clearly beyond the scope of the employment, and there was raised an implied promise to pay for it. When the attorney was employed to do it, he was not a member of the County Court, and the case is not in point here.

Whatever may be said as to the moral obligation of the county to pay for this service, we can see no ground of legal liability which the Court can recognize, and the decree of the Court of Chancery Appeals is affirmed with costs.

PETITION TO REHEAR.

WILKES, J. Upon petition to rehear this cause, it is pressed upon the Court that the services for which compensation is asked, the superintendence of improvements on the courthouse and jail, were outside of, and entirely independent of complainant's duties as a committeeman, and were such as belonged to a superintendent or architect, and such as did not devolve, as matter of law or duty, on complainant as committeeman or member of the County Court. It was assumed that this feature of the law was overlooked. A mere glance at the opinion is sufficient to show that this feature was fully considered, and it was stated that the labor performed by the complainant was faithful and continuous and made more onerous and necessary, and at the same time beneficial to the county, by the failure of the architect to perform his duty.

The record shows that the complainant made frequent reports of progress to the County Court, and always in the character and capacity of a committeeman, and it does not show that he at any time brought to the Court's attention that he was discharging an architect's duties, or that the architect was derelict in the discharge of his own duties. If, however, we were to grant that he did service outside of his duty as committeeman (which, under the record, we could not concede), still it is clear that he did not do it under contract with the county, but as a volunteer, and, under the ordinary

rules of law as between individuals, he could not recover for gratuitous services. The theory now pressed upon us, in the petition to rehear, that complainant can recover as upon a contract, either expressed or implied, presents a grave question, and that is whether a member of the County Court elected to fill that office, his compensation being fixed by law, can contract with the County Court, of which he is a member, to render service for extra pay, and especially a service performed upon a committee appointed to attend to a matter necessary for the proper administration of the affairs of the county. This view was not presented on the original hearing.

It is the policy of the law to prohibit members of the County Court, and of municipal councils generally, from making contracts with their own members for any purpose which calls for compensation out of the public treasury. The theory is that the same individuals shall not authorize a contract, fix compensation for it, and elect or appoint one of their own members to execute it, and then receive pay therefor, no matter how well a member may be fitted for the particular service. Accordingly, the Act of 1869–70, Ch. 92, Sec. 1, provides that "it shall not be lawful for any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work, or any contract in which any public, municipal corporation, county or State, shall

or may be interested, to be directly or indirectly interested in any such contract." Shannon, § 1133.

"Should any person, acting as such officer, committeeman, director, or other person above referred to, be or become directly or indirectly interested in any such contract, he shall forfeit all pay or compensation therefor." *Ib.*, § 1134.

"Such officer shall be dismissed from such office as he then occupies, and be ineligible for the same or a similar position for ten years." *Ib.*, § 1135.

It is difficult to see how, under these provisions, the County Court, or any city council, can make a contract with any of its members to do any sort of service for compensation, to be paid out of the treasury, or can pay a member for such services upon a *quantum meruit.* This Act is but an extension of the provisions of the Act of 1857–58, Ch. 7, Sec. 1, to the county and State, as well as to municipal corporations, prohibiting any person holding office from taking any contracts from the body of which he is a member. See Shannon, §§ 1995, 1996.

The theory and spirit of all these laws is that in rendering services which should be done by members of these bodies pertaining to their official position, they act simply in discharge of duties for which the statute provides compensation. For all other services they are incompetent to contract, and for such outside work it is unlawful for them to contract or receive compensation. If it becomes necessary to contract for such services, such contract must be made with

a disinterested third person, and not with a member of the body whose office it is to make the contract and provide the pay. We cannot ignore these provisions of the statute, no matter how necessary or valuable the services of complainant may have been, nor how worthy of compensation if done by a third person.

The petition to rehear is dismissed.

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McQuade *v.* Williams.

(*Knoxville.* October 8, 1898.)

1. Res Adjudicata. *Facts that do not constitute.*

A judgment creditor's suit, attaching his debtor's shares of stock upon the ground that they have been fraudulently transferred, cannot be defeated by the fact that he had been cast in a former suit, wherein he had sought to enforce against his debtor and the corporation title to said shares, acquired by purchase at execution sale, which was based upon a levy rendered invalid by reason of an existing pledge of the shares. (*Post, pp. 335–337.*)

Case cited: Boyd *v.* Robinson, 93 Tenn., 2.

2. Court of Chancery Appeals. *Findings conclusive, when.*

The finding of the Court of Chancery Appeals, that a transfer of shares of stock is fraudulent and void, is a finding of fact that is conclusive in this Court. (*Post, p. 337.*)

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. McConnell, Ch.

Frank Spurlock and T. C. Latimore for McQuade.

Cantrell & McReynolds, Moon, Daniels & Garvin, and M. H. Clift for Williams.

Wilkes, J. This is a suit by a judgment creditor to subject to attachment and sale fifteen shares of stock of the Chattanooga Opera House Company,

as the property of J. T. Williams. The Chancellor granted relief, and the Court of Chancery Appeals affirmed the Court below, and defendants have appealed, and assigned errors.

The first error complained of is that the matters presented in the controversy are *res adjudicata*, and the Court of Chancery Appeals should have so held. It appears that on November 18, 1891, the complainant, having a judgment against J. T. Williams, levied on this stock by execution at law, and sold it, and bought it at the Sheriff's sale. In January, 1895, he filed a bill, and alleged that when he levied upon this stock, and when he sold it, it was under pledge to a third person, and hence he had failed to get any title, but that the debt for which the stock was pledged had been since satisfied, and that Williams, the debtor, had transferred the stock to Kittie E. Loyd, without consideration, and the Court was asked to declare that transfer void, and to compel the corporation to issue the stock to him. The answers in the case denied the case as made out by the bill, insist that the levy and sale were void, but that Kitty Loyd had title to the stock under the transfer, and had paid full consideration for it. The special Chancellor in that case held that the complainant took nothing under his levy, because the stock at the time was under pledge. It thus appears that the only question adjudicated in that case was the title and right acquired by complainant by virtue of his levy and sale under exe-

cution. The right to subject the property by attachment, and to set aside the sale for fraud, in fact, were not passed upon or considered.

It is insisted, however, that the decree in that case must, under well-known rules, be held conclusive, not only of all facts and issues presented, but also of all issues and facts that might have been presented, and we are cited to *Boyd* v. *Robinson*, 9 Pickle, 2, and other cases holding this doctrine.

The language used in the Boyd case, is "that the decision is conclusive on every point which properly belongs to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time." Tried by this rule, the decision cannot be treated as conclusive, because the first case in no sense involved the right to proceed to subject the stock by attachment, but it was solely a suit in aid of the sale under execution. The fraudulent character of the transfer could not have been considered, because the complainant, while seeking to hold under an execution sale, absolutely void, had no status to question the good or bad faith of the transfer to Kitty E. Loyd, and did not attempt to do so, except that it was not based on any consideration and was null and void as to his levy and sale. Complainant could have questioned Kitty E. Loyd's title only by showing that he acquired title under his sale. Otherwise he had no status to contest. It is said the Court of Chancery Appeals erred, as

a matter of fact, in holding that the original cause was pending when the present bill was filed, when such was not the fact, and this, it is claimed, appears from the record in this case. We need not pass on this, inasmuch as it is immaterial to the rights of defendants. The Court of Chancery Appeals treat the defense made as that of *res adjudicata*, and find against the defendants. Now, if the former suit were pending, and not determined, the defense should not have been that of *res adjudicata* or former judgment, but that of former suit pending, and in either event, the record fails to show a former suit involving the same questions, either pending or determined.

This disposes of the only assignment made to the decree of the Court of Chancery Appeals in proper manner. There is a general statement that for other errors reference is made to the original assignment before the Court of Chancery Appeals. It is there assigned that the Chancellor was in error in holding that the transfer from Williams to Kitty E. Loyd was fraudulent and void. This is a question of fact, and the finding of the Court of Chancery Appeals is conclusive. We see no error in the decree of the Court of Chancery Appeals, and it is affirmed with costs.

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HOLTZCLAW *v.* HAMILTON COUNTY.

(*Knoxville.* October 8, 1898.)

1. COUNTY JUDGE. *No power to bind county, when.*

A County Judge cannot bind the county by a contract to pay a person for examining bills of cost which have been paid to the Clerk of the Circuit Court and the District Attorney by the Court for a period of several years before the investigation is ordered. (*Post, pp. 340, 341.*)

2. ANSWER. *Effect of denials of.*

An answer, in an action against a county to recover for services rendered to it, which denies that the county made the contract relied upon by the plaintiff, puts in issue the authority of the County Judge to make such contract for the county, where it is claimed that the contract was executed by him in behalf of the county. (*Post, pp. 339, 340.*)

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County. T. M. MCCONNELL, Ch.

PRITCHARD & SIZER for Holtzclaw.

C. R. EVANS and COOKE, SWANEY & COOKE for Hamilton County.

Holtzclaw *v.* Hamilton County.

WILKES, J. This is an action against Hamilton County for compensation for services rendered and to be rendered in the examination of bills of costs which have been paid to the Clerk of the Circuit Court and District Attorney by the Court for a period of six years before the investigation ordered.

The theory of complainant is, that he was employed by the Judge of the County Court for the County to make such investigation at a fixed rate of compensation, and was discharged after only a few days' service and while the work was unfinished, and without any legal cause.

The defense is, that the complainant was not employed by the county, but by the County Judge, and that he had no power to make such contract or bind the county under the law.

It is assigned as error in this Court that the power of the County Judge to make such contract is not put in issue by the pleadings, proof, or assignment of errors. The answer denies that the county made such contract, but it is insisted that this contention was, not that the County Judge did not have the power to make the contract, but that as a fact he did not make it.

We think the true question is not whether the County Judge had the power to make the contract, but did he have the power to bind the county by it, and the defense that the county did not make the contract puts in issue not only the fact, but the authority of the County Judge to make such

contract for the county. We are aware of no law authorizing the County Judge or County Court to employ any person to make an investigation of this kind, as a matter of contract. It is true the County Court represents the county, and if it conceives that it has the power to make such investigation, it could do so directly as a body, or by appointing some of its members to do the work, as was afterward done. Whether such appointees would be entitled to compensation we need not consider, as that question is not involved, and is one of very grave doubt.

It is also true that the County Judge is the financial agent of the county, but it is equally true that it is his duty officially to audit all accounts against the county, and this power he cannot delegate. If he can, by virtue of his office, overhaul accounts already audited and passed, about which we express no opinion, we know of no statute or law authorizing him to employ another, at the county's expense, to do such service. Such person, or the Justices, in case they act, could only gather information for such further action as the law warrants, and neither could exercise the judicial functions of passing on bills of cost.

The Court of Chancery Appeals was of opinion that, although there was no assignment of error raising the question of the power of the County Judge to make such contracts, still the Court must repel any claimant who fails to show a valid contract

with the county. In this conclusion we concur. If there is no authority to hold the county for any particular item of cost or expense, the Courts must arrest any proceeding for that purpose, even if prosecuted by consent.

The decree of the Court of Chancery Appeals is affirmed with costs.

CHATTANOOGA *v.* DOWLING.

(*Knoxville.* October 8, 1898.)

1. MUNICIPAL CORPORATIONS. *Liable for creation of nuisance.*

A municipality, in pursuing a public work, is not privileged to commit a nuisance to the special injury of a citizen, and, if it does, it must, as a private individual, respond in damages therefor. (*Post, pp. 344, 345.*)

Cases cited: Burtram *v.* Chattanooga, 7 Lea, 739; 13 Wall., 166; 51 N. H., 504 (S. C., 12 Am. Rep., 147); 7 Gray, 100; 79 N. Y., 470 (S. C., 35 Am. Rep., 540).

2. ACTIONS. *Successive maintainable, when.*

A nuisance arising from the discharge of a city's sewerage near private property is a recurring one, and will sustain successive actions where the plan for sewers adopted by the city contemplates the discharge of the sewerage at another point, and its discharge at the point in question is apparently only temporary. (*Post, pp. 345–347.*)

Cases cited: Carriger *v.* Railroad, 7 Lea, 388; Harmon *v.* Railroad, 87 Tenn., 614; Nashville *v.* Comar, 88 Tenn., 418; 101 N. Y., 98.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. MCCONNELL, Ch.

SHEPHERD & FRIERSON for Chattanooga.

W. B. GARVIN for Dowling.

BEARD, J. The defendant is the owner of a lot in the city of Chattanooga, very near which termi-

nates a sewer constructed by that city at much expense, through the mouth of which much loathsome sewerage is deposited upon the defendant's land, greatly depreciating its rental value, as well as the value of the soil upon it, theretofore used by its owner for the purpose of making brick.

The record discloses that in three different suits, instituted by Dowling from time to time, he had made recoveries against the municipality for the injuries resulting to this land, as from a continuing nuisance, and that when the present bill was filed, he had begun a fourth suit to recover for the same nuisance, such damage as had accrued to him since the commencement of the third and last action. The present bill was filed upon the theory that Dowling's injury, if any had been received by him, was permanent in its character, and that the recoveries already obtained by him, as a matter of law, precluded him from maintaining another action for the same injury; especially was it insisted that this was the effect of the third suit and recovery, as it was averred that the measure of damages then set up and obtained was for a permanent injury. Accordingly, complainant asked that he be enjoined from prosecuting the then pending suit, or any other suit against the complainant for the same cause of action.

So far as the recovery in the third of these successive actions is concerned, it is only necessary to say that it is clear, from the record, that it

embraced only the damage sustained by Dowling up to the commencement of that action, and the use of the word "permanent" in his declaration was not intended to and did not carry his claim further than that; and there is no pretense that the other suits did anything more.

The insistence, however, is made that whatever may have been the purpose of his previous litigation, yet such is the character of the work done by the city in the construction of the sewer, as well as its lawfulness under its charter, that a recovery, as a matter of law, could be made only on the basis of a permanent injury, and that Dowling is estopped from maintaining his present suit, even if he had heretofore failed to recover his entire damages.

It clearly appears that the sewer in question formed a part of a plan or system projected for the city of Chattanooga; that the purpose of the authorities was to extend it to a place very much beyond the property of Dowling, where its contents would be discharged into a creek, and thence into the Tennessee River, but, for reasons satisfactory to these authorities, it was left in its present unfinished condition; that, as far as the work has progressed, it has been well and regularly done, in a form that is permanent, and under the authority of law.

It may be taken for granted that the power of the city of Chattanooga to construct this sewer did not involve the right to so construct it as that its offensive contents would be frequently, if not con-

tinuously, discharged upon Dowling's land. The authorities agree that a municipality in pursuing a public work is not privileged to commit a nuisance, to the special injury of the citizen, and if it does, it must, as would a private individual, respond in damages therefor. *Burtram* v. *Mayor & Aldermen of Chattanooga*, 7 Lea, 739; *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166; *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H., 504 (S. C., 12 A. R., 147); *Proprietors of Locks* v. *Lowell*, 7 Gray, 100; *Nooman* v. *City of Albany*, 79 N. Y., 470 (S. C., 35 A. R., 540); Dillon on Mun. Cor., Sec. 1047.

But the question here presented is, conceding the liability of the city to suit for the injury complained of, should all the damages have been recovered in one action by the injured party, or can he maintain successive suits until the nuisance is abated?

Carriger v. *Railroad Co.*, 7 Lea, 388, was an action against a railway company for so carelessly constructing its road as to cause the plaintiff's land to overflow. The embankment which impeded the natural flow of the water, and threw it back on the land of the plaintiff, was built on the company's right of way, under the authority of its charter, and it was permanent in its character, yet it was said by this Court that "each overflow caused by the negligence, carelessness, or want of skill of the defendant, or its agents, is an independent wrong, and a cause of action for the damages resulting therefrom to the

crops and other property of the rightful possessor of the soil or premises."

In *Harmon* v. *Railway Co.*, 87 Tenn., 614, it was held that if a railway company, lawfully located upon a street in a city under its charter, and by permission of the local government uses the street beyond what is necessary for the proper running of its trains, and by such excessive and improper use substantially affects the easement of way and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance, recovering the damages that have accrued up to the time each action is instituted, and a recovery in one action will not bar a subsequent one brought for a continuance of these wrongs.

The opinion in that case was rested largely upon the leading case of *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y., 98, in which it was held that where a railroad corporation or municipality, under proper authority, erects an embankment in a street, if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property; but if it be carelessly and unskillfully done, it can be made liable, in successive actions, until the nuisance is abated.

But if any doubt remained as to the rule, in cases of this sort, in this State, we think it was set at rest in *Nashville* v. *Comar*, 4 Pickle, 418. In that case the city of Nashville had constructed a sewer along one of its streets, the supposed defect

of which seemed to be that it had not capacity sufficient to carry off the storm water flowing into it, so that, upon occasions, the pressure of accumulative sewerage and storm water had been so great as to back or throw the contents of a smaller and tributary sewer of Comar, on his premises. On the trial the Circuit Judge told the jury that in such a case the measure of damages was "the difference in market value of the property before and since the building of the sewer." This charge of the trial Judge was maintained in argument by the counsel of Comar as correct, upon the suggestion that the sewer was a permanent improvement, and whatever damage it occasioned was of a permanent character, and it was therefore insisted that, for this reason, he could only bring one action, rather than successive actions, and must recover damages once for all. This view was rejected by this Court, as being based upon "the assumption that the premises of Comar will, for all time to come, be subjected to the same disgusting invasions of sewerage as have heretofore occurred." Continuing, this Court said: "The complaint is not that the city has been guilty of any misconduct in erecting a sewer where this has been constructed, but that its servants have so unskillfully built it that upon the occurrence of unusual conditions it discharges its contents upon the premises of defendant in error. Now, upon what authority is it to be assumed that the negligence or unskillfulness of the servants of the city, in the construction of this sewer, will

not be remedied?" After a careful examination of the cases, and a repudiation of the measure of damages adopted by the trial Judge, that opinion announces "that the true rule, deducible from the authorities, is, that the law will not presume the continuance of wrong, nor allow a license to continue a wrong, when the cause of the injury is of such a nature to be abatable, either by the expenditure of labor or money; and that where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrongdoer are only such as have accrued before action brought; and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."

The principle here so distinctly stated disposes of the contention of complainant in the case at bar; for the insistence of Dowling is, not that the city of Chattanooga had no right to erect this sewer, nor that it is not expensively and permanently done, as far as it has gone, but, rather, that the sewer has been negligently and unskillfully stopped at its present point of termination, so that the necessary result is to flood his land with its contents, to his serious detriment.

To hold that, for such a nuisance, the injured party could have only one action, in which he must recover all his damages, past and prospective, would not only be to assume that the wrongdoer will always persist in his misconduct, but would be,

in effect, to give him a license to continue in it. The Courts will do neither.

Without prolonging this opinion by an analysis of the cases cited by complainant as holding to a contrary view, we are satisfied that the Court of Chancery Appeals was right in reaching this conclusion, and the decree of that Court is therefore affirmed.

STATE *v.* AMOS.

(*Knoxville.* October 12, 1898.)

DISTRICT ATTORNEYS. *Powers of assistant.*

An assistant of a District Attorney, appointed under Acts 1897, Ch. 24, cannot sign an indictment except in the presence and by consent or direction of his principal, since the Act, if construed to authorize a general delegation of the functions of the office to an assistant, or to invest him with power to perform other than clerical duties, must be held unconstitutional.

Constitution construed: Art. VI., Sec. 5.

Act construed: Acts 1897, Ch. 24.

FROM MARION.

Appeal in error from Circuit Court of Marion County. FLOYD ESTILL, J.

Attorney-general PICKLE for State.

B. E. TATUM for Amos.

WILKES, J. This is an indictment for perjury. There is a plea in abatement that it is not signed by the District Attorney-general, nor by his authority, nor in his presence. To this plea, there was replication that the indictment was signed by an assistant of the District Attorney-general, duly ap-

pointed by him, under the Act of 1897, Chapter 24. There was demurrer to this replication, alleging that the assistant of the District Attorney could not sign an indictment, and this was sustained; and, upon the refusal of the District Attorney-general to plead further, the indictment was quashed, and the State has appealed.

The question presented is the constitutionality, validity, and construction of Chapter 24 of the Acts of 1897, authorizing District Attorneys-general in certain counties to appoint an assistant, and as to the power of the assistant if lawfully appointed.

The Constitution provides for the election of District Attorneys-general by the people, and for the appointment of a *pro tem.* officer in the absence of the regular officer, but there is no provision authorizing the District Attorney-general to appoint any deputy or assistant in the Constitution. Constitution, Art. 6, Sec. 5; Code, §§ 393, 394.

It appears that other constitutional officers have been empowered and have employed deputies during almost the entire existence of the State, such as Clerks, Trustees, and Sheriffs. These appointments have been made under various statutes, as there is no constitutional provision on the subject. These officers are, however, of a clerical or executive character, and none of them are judicial or quasi judicial in their functions.

It has been uniformly held that an indictment must be signed by the District Attorney-general, and

it is likewise held that he may authorize another to sign his name officially, or he may adopt and ratify a printed signature. This is upon the theory, however, that there is a specific adoption or ratification of each signature, and not upon the idea that he may delegate authority generally to an assistant to sign his name in his absence, and to perform the functions of the officer generally.

In the present case the District Attorney, in his sworn replication, states that the signature was made by his assistant under and by virtue of the Act of 1897, and the inference is that in this way and to this extent it was by his consent and direction, for it does not negative the averment in the plea that it was not done in his presence. Moreover, the demurrer to this replication raises the question that such signature could not be made under and by virtue of the Act of 1897, and that is the question with which we have to deal.

We are of opinion that while the Act of 1897 is valid, it is only upon the construction that the assistant therein provided for is authorized to do clerical work alone, and not to exercise the functions of the office generally. While, therefore, the District Attorney might authorize the assistant or clerk to sign his name to an indictment, it must be the particular indictment, and in his presence, and the assistant is not by this Act clothed with the power to exercise the functions of the office generally.

The Constitution, Art. 6, Sec. 5, provides that

"in all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney *pro tempore.*" It is clear that in such cases as provided in this section, the Legislature could not empower the District Attorney-general to appoint an assistant with power to exercise the functions of the office, but the office can only be filled *pro tempore* by the Court as the Constitution provides.

The indictment in this case having been signed under the authority of that Act, and not otherwise, and not being alleged to have been done in the presence of the District Attorney, nor by his consent and direction, except so far as the same is authorized by that Act, is bad, in the opinion of the majority of the Court, and the action of the Circuit Judge in quashing the same is affirmed, and the indictment is quashed, and the State will pay the costs.

BARNES BROS. *v.* COAL CO.*

(*Knoxville.* October 12, 1898.)

1. STATUTE OF FRAUDS. *Must be plended.*

The statute of frauds is not available as a defense unless pleaded. (*Post, pp. 355, 356.*)

Case cited and approved: Citty *v.* Mfg. Co., 93 Tenn., 276.

2. CORPORATIONS. *Strangers not affected by by-laws.*

A third person or stranger to the corporation is not affected by the by-law of a corporation, of which he has no knowledge, to the effect that no contract can be made for a longer time than three months, without the approval of the board of directors. (*Post, p. 356.*)

Cases cited: 24 N. J. L., 440; 19 Johns., 115, 124.

3. RES ADJUDICATA. *What is not.*

The recovery of past due installments of rent, accruing under a lease for a term, at a specified monthly rental, constitutes no bar to the recovery in another action for installments that subsequently fall due. The lease contract in such case is separable, not entire. (*Post, pp. 356–361.*)

Case cited and approved: Coleman *v.* Hudson, 2 Sneed, 465.

Cited and distinguished: Tarbox *v.* Hartenstein, 4 Bax., 78; Railroad *v.* Staub, 7 Lea, 397; Hughes *v.* Cannon, 1 Sneed, 622.

4. CONTRACT. *Separable or entire, when.*

Whether a contract is entire or separable into several independent contracts, permitting several actions thereon, depends upon the intention of the parties, to be ascertained from the language employed and the subject-matter of the contract. (*Post, pp. 351–358.*)

*The effect of corporate by-laws as notice is considered, with review of the authorities, in note to Moyer *v.* East Shore Terminal Co. (S. C.), 25 L. R. A., 48.—REP.

Cases cited: 128 U. S., 446; 100 Am. Dec., 560; 59 Am. St. Rep., 278; 68 Am. Dec., 382.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County. T. M. McConnell, Ch.

White & Martin for Barnes Bros.

F. S. Yager and Washburn, Pickle & Turner for Coal Co.

Wilkes, J. This is a suit for rents, brought by Barnes Bros. against the Black Diamond Coal Co. for the months of March, April, May, June, July, and August, 1896, claimed under a lease contract. The Chancellor refused any relief. The Court of Chancery Appeals reversed the Chancellor and gave judgment for the amount claimed. The defendant coal company has appealed and assigned errors.

The Court of Chancery Appeals find as a fact that the defendant leased the coal yard from the complainant for a term commencing April 1, 1895, and ending September 1, 1896, at a monthly rental of $30 per month. It is objected that the contract is voidable under the statute of frauds. The Court of Chancery Appeals report as a fact that the con-

tract, as a whole, was both oral and in writing and the terms are set out in letters between the parties. In addition, the statute of frauds was not pleaded, and this is fatal to it as a defense. *Citty* v. *Mfg. Co.*, 9 Pickle, 276.

It is next said a contract, under a by-law of the corporation, could not be made for a longer time than three months, without the approval of the board of directors. The Court of Chancery Appeals find as a fact that complainant had no knowledge of such by-law. In such case, being a third person or stranger to the corporation, complainant would not be affected by its by-laws. Thompson on Pri. Cor., Secs. 940, 942; *State* v. *Overton*, 24 N. J. L., 440; *Smith* v. *Bank*, 19 Johns., 115, 124. The contract in this case was made by the president of the corporation. It appears that the letter heads used in the correspondence about the lease contains this clause: "No contract is binding with the Black Diamond Coal Company until approved by the president." This appears to have been all the notice complainant had on this feature of the case.

It is next said the matter is *res judicata*.

It appears that previous to the present suit, complainant brought an action for the rents of December, 1895, and January and February, 1896, and recovered $90, or at the rate of $30 per month for the three months. The rents previous to December, 1895, were paid. It is insisted this is a bar to any further

action for the breach of this contract. The argument is, that the contract is entire for the term, even although the rental is so much per month, and, being an entire contract, there can be but one breach and one recovery therefor. If the contract is an entirety, and not divisible, it must follow, under the authorities, that there can be but one breach and one recovery. *Tarbox* v. *Hartenstien*, 4 Bax., 78; *Railroad* v. *Staub*, 7 Lea, 397. A single cause of action cannot be split in order that separate suits may be brought for the various parts of what really constitutes but one demand. 1 Enc. Pl. & Pr., pp. 148, 153. Taking judgment by mistake for a less sum than due will not justify the plaintiff in recovering the residue in another action. *Saddler* v. *Apple*, 9 Hum., 342; 1 Enc. Pl. & Pr., 150, note; *Thomason* v. *Rice*, 1 Shan., 70. As to when a contract is entire and when it is divisible is a question upon which there is a great confusion among the cases. It is said, "Whether a contract is entire or separable into several independent contracts depends upon the intention of the parties, to be ascertained from the language employed and the subject-matter of the contract." 1 Enc. Pl. & Pr., pp. 150, 152, note 1; *Pollak* v. *Brush Electric Association*, 128 U. S., 446; *Shinn* v. *Bodine*, 100 Am. Dec., 560; *Huyett* v. *Chicago Co.*, 59 Am. St. Rep., 278, and cases there cited. And, again, "Common sense must be applied to each case rather than any technical rules of construction." *Leonard* v. *Dyer*, 68 Am.

Dec., 382. The general test rule to determine whether a contract is divisible or entire is stated by Mr. Parsons thus: "If there are many parts of the contract, and some have been broken and others not, yet—as, if money was to be paid on the first of every month for two years, and one year has expired and nothing has been paid—the creditor may bring his action for one or more of all the sums due and recover accordingly, and may, when the others fall due and are unpaid, sue for them." 3 Parsons on Contracts (5th Ed.), 188, 189. To the same effect see *Huyett* v. *Chicago Co.*, 59 Am. St. Rep., note on page 279, where the authorities are cited and fully collated.

The distinction between the two classes of contracts is plainly stated in *Coleman* v. *Hudson*, 2 Sneed, 465, as follows: "In the former (entire contracts) the consideration is entire on both sides. It does not, either by its terms or the implied intention of the parties, contemplate or admit of apportionment upon a partial failure on either side, and the complete fulfillment of the contract by either is required as a condition precedent to the fulfillment of any part of the contract by the other. A severable contract is a contract the consideration of which, by its terms, is susceptible of apportionment or division. There is in such cases no entirety of consideration on either side constituting a condition of the agreement, and neither party can claim more

than an equivalent for the actual consideration on his part." Citing authorities.

"There is another class of cases noticed in some of the books, of a mixed nature, partaking of the character both of entire and severable contracts, and which may be considered as entire or several according to the circumstances of the particular case." Story on Contracts, Sec. 24.

It was held in the above case of *Coleman* v. *Hudson*, 2 Sneed, that a contract to deliver, for a price named therein, from one hundred to one hundred and fifty head of beef cattle, from February 1 to the last of July, in lots of twenty or more monthly, and all the hogs that are fed with the cattle, at the market price, was divisible into several contracts, as respects the remedy, for a breach of either of which a separate action would lie. As illustrating the rule, it is held that when a promissory note is payable in installments, an action may be maintained for each installment when it becomes due, and the statute of limitations begins to run from that time. *Bush* v. *Stowell*, 10 Am. Rep., 694. See, also, *Badger* v. *Titcomb*, 26 Am. Dec., 611–613; *Lorrillard* v. *Clyde*, 19 Am. St. Rep., 470. See, also, *Colemnan* v. *Hudson*, 2 Sneed, 463. Installments of rent are subject to the same rule as installments of money due, and an action may be brought as each installment falls due. 1 Enc. Plead. & Prac., 155, note 3; *Steinkuhl* v. *Hardin*, Jackson, 1875; 1 King's Dig., p. 561; manuscript opinion.

The cases, it appears, however, are uniform in holding that contracts for personal services must be treated as entire and not divisible, and, hence, there can be but one breach and one recovery upon default, no matter if the wages are payable by installments or at stated periods. See the cases collated in 59 Am. St. Rep., 290. And in accord with this holding are our cases of *Hughes* v. *Cannon*, 1 Sneed, 622; *Tarbox* v. *Hartenstein*, 4 Bax., 78; *Railroad* v. *Staub*, 7 Lea, 397. Whether this distinction arises out of the nature of the contract or is based on some other ground, it is well recognized and enforced in cases where the holding would evidently be different if it were not a contract for personal services, and, whether based on sound reasons or not, we must recognize contracts for personal services as entireties. But in regard to rentals there is perhaps no more common form of contract than a rental by the year payable monthly, and it cannot on any sound reason be held that, if the tenant breaches the contract and abandons the premises, a suit for the first month's rent would bar recovery for subsequent months as they accrued.

We are of opinion, further, that the statute (Shannon, § 4620) is applicable to this case. It provides that "successive actions may be maintained on the same contract or transaction whenever, after the former action, a new cause of action arises therefrom." A new cause of action arises and becomes enforceable with every successive installment. It is

not meant that a complainant can unnecessarily vex the defendant with successive small suits, for in such cases injunction will lie to prevent multiplicity of suits, and accordingly it is a well established rule that when an action is brought to collect installments it should include all then due, and that those then due constitute together but one cause of action, and some of the cases go to the extent that a recovery in one suit will bar a second action to recover other similar claims or installments that were due when the first was brought. 1 Enc. Plead. & Prac., p. 155, notes 2 and 3, and cases cited.

We are of opinion that there is no error in the decree of the Court of Chancery Appeals, and it is affirmed with costs.

RAILROAD *v.* FLOWERS.

(*Knoxville.* October 12, 1898.)

1. CERTIORARI AND SUPERSEDEAS. *Motion to dismiss.*

The requirement that motion to dismiss petition for writs of error and supersedeas shall be made at the first term, means at the first term after notice to the adverse party. (*Post*, *p.* 365.)

Code construed: § 4863 (S.); § 3848 (M. & V.); § 3132 (T. & S.).

Cases cited: Nicks *v.* Johnson, 3 Sneed, 326; Chappel *v.* Jones, 8 Hum., 107; Nance *v.* Hicks, 1 Head, 624; Bank *v.* Hughes, 2 Cold., 55; Gardner *v.* Barger, 4 Heis., 672; Boyers *v.* Webb, 1 Lea, 698; Hodge *v.* Dillon, Cooke, 281; Hardin *v.* Williams, 5 Heis., 388.

2. SAME. *Waiver of objection to petition.*

A motion to dismiss a petition for writs of certiorari and supersedeas for want of any excuse for failure to appeal, comes too late when made after an intervening term, at which the mover demanded a jury trial, and consented to a continuance of the case. (*Post*, *pp.* 364–366.)

3. APPEAL. *Motion to dismiss waived, when.*

A party waives his motion to dismiss an appeal for want of bond where he fails to take any action upon such motion, and treats the cause as properly brought up by a subsequent proceeding by certiorari and supersedeas. (*Post*, *pp.* 366, 367.)

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. JOHN A. MOON, J.

Railroad *v.* Flowers.

SHEPHERD & FRIERSON for Railroad.

C. D. GIDDINGS and T. C. LATIMORE for Flowers.

SNODGRASS, C. J. Flowers sued the railroad company before a Justice of the Peace and obtained judgment for $132, March 24, 1896. On March 27, the company prayed and was allowed an appeal by the Justice of the Peace, upon consideration that it give bond five days before the May term of the Circuit Court. A bond was given in accordance with the Justice's agreement, but, by mistake, was not signed by a surety, the president of the company signing its name, and "by him," as president, thus conjoining both names. It seems to have been treated as a double signing of principal and surety, but, of course, did not have this meaning or effect.

It therefore appears that the appeal was prayed too late, and no proper bond was given. The papers were, however, returned to the May term of the Circuit Court (May 4). On June 5 (at same term) Flowers moved to dismiss the appeal because the appeal bond was "not filed within the time allowed by law, and for want of surety on the bond." This motion was sustained June 9. The appeal was dismissed and judgment rendered for the debt and costs. On the day following, on motion of defendant, the judgment was set aside because the papers in the case had not been filed in the Circuit Court until May 4, and "because the same came up too late for action at this term of the

Court." The motion to dismiss was "stricken out, and with leave to refile at next term of the Court." This action was had on June 9, and during the May term. No other steps were ever taken on this motion. It was not remade or renewed at the September term, and nothing further was done as to the appeal. The case remained docketed as it had theretofore been, and under the same number, 7285. But on the next day, after the judgment dismissing the appeal was set aside, defendant filed a petition for certiorari and supersedeas. Bond was given, and fiat for the writs made. Whether or when they, in fact, issued does not appear by any copies or official indorsements in the transcript. It is to be taken that they issued, because later there was a motion to dismiss them by plaintiff, which was sustained, and on the correctness of which action our judgment is invoked on this appeal. The writs were properly returnable to the September term. At this term the following orders appear:

"September 7, 1896.—*Flowers* v. *Railway Co.*, No. 7285. Comes the plaintiff and damands a jury to try this case.

"November 9, 1896.—*Flowers* v. *Railway Co.*, No. 7285. This cause is continued to next term by consent."

At the next term (February 22, 1897) the plaintiff, Flowers, moved to dismiss the writs, because appeal papers showed "that defendant lost its appeal by negligence;" that petitioner showed no suf-

ficient cause why it did not "make application for the writs at the first term of the Circuit Court after rendition of judgment of the Justice." This motion was sustained by the Court, and proper judgment rendered on certiorari and supersedeas bond. The defendant appealed, and assigned errors.

It is insisted that it was error to dismiss the petition, because the motion was not made at the return term, as required by law. Car. Hist. Lawsuit, Sec. 670; 3 Sneed, 326; 8 Hum., 107; 1 Head, 624; 2 Cold., 55; 4 Heis., 672; 1 Lea, 698; Cooke, 281; Code (Shannon), § 4863. These authorities and others sustain the proposition, with the qualification that the motion must be made at the earliest opportunity presented. It must be only, of course, made at the first term after the adverse party has had notice. 5 Heis., 388. As it does not affirmatively appear that plaintiff had such notice before his motion was made, these questions are out of the way, and we can consider the question on its merits and in connection with another question yet to be noticed.

The motion on the second ground was not sustainable. "The application" for the writs was made at the first term. The first objection, however, was well taken. The failure to appeal was negligence not legally excused or accounted for. *Cox* v. *Kent*, 1 Leg. Rep., 245. But the difficulty in plaintiff's case is that the motion to dismiss the certiorari came too late. It appears that at the succeeding

term after the petition was filed plaintiff demanded a jury, and later at the same term consented to a continuance.

The plaintiff insists that these orders appear to have been made only in the case, without reference to or acknowledgment of the certiorari, and must be applied to the still pending appeal. His counsel put the proposition thus: "The motion to dismiss the appeal does not appear from the record ever to have been renewed, and the case on appeal still stands on the docket for trial." This is true, and, as a consequence, the whole case is yet there for trial. There were not two cases. There were two efforts—one by appeal and one by certiorari—to bring the one case to the Circuit Court. So long as it remains there, there can be no final judgment. The dismissal of the petition for certiorari would only be a mere form on the theory that the appeal was pending. In this aspect, the demand for a jury and continuance by consent must be held a waiver of objection to appeal or certiorari for irregularities, and to leave the case standing on its merits for trial in the form it then was, the certiorari bond supplying the defective appeal bond, and the petition, under the circumstances, could not be dismissed. The waiver of objection to the appeal and failure to make objection to the petition at that term must be held to be a recognition of the existence of a pending case for trial on the merits, and it must be so tried. Plaintiff's failure to ob-

ject to the appeal must be taken as conclusive that he recognized the certiorari at that term as obviating all objections. If the case is pending at all, it is pending on all preliminary efforts to make it so preceding the continuance.

The judgment is, therefore, reversed and the case remanded for trial. The costs of this Court will be paid by defendant in error.

CORBETT *v.* SMITH & CO.

(*Knoxville.* October 15, 1898.)

1. DEMURRER TO EVIDENCE. *Properly sustained, when.*

The Court properly sustains defendant's demurrer to the plaintiff's evidence, where it does not make out a *prima facie* case. (*Post, p. 369.*)

2. SAME. *Practice established.*

The practice of demurring to evidence is firmly established in this State. (*Post, pp. 369, 370.*)

Case cited and approved: Hopkins *v.* Railroad, 96 Tenn., 420.

3. SAME. *How evidence is weighed.*

On demurrer to evidence that is conflicting, the plaintiff is not entitled to have the evidence viewed in the most favorable light to himself, but the Court will look to the whole evidence, excluding none, and draw such inferences therefrom as are reasonable and just. (*Post, p. 374.*)

4. MASTER AND SERVANT. *Servant assumes risk, when.*

A servant assumes the risk incident to the work which he is directed to do, including an increased risk arising during the performance of the work, where he is fully aware of the danger, and does not rely upon a promise to remedy it. (*Post, pp. 372, 373.*)

Cases cited and approved: Railroad *v.* Elliott, 1 Cold., 611; Knox *v.* Coal Co., 90 Tenn., 546.

FROM KNOX.

Appeal in error from the Circuit Court of Knox County. JOSEPH W. SNEED, J.

CLARENCE TEMPLETON and TEMPLETON & CATES for Corbett.

JOUROLMON, WELCKER & HUDSON and WELCKER & PARKER for Smith & Co.

WILKES, J. This is an action for personal injuries. The plaintiff introduced his evidence, when defendant demurred to it, and issue was joined. The Court was of opinion there was no case of liability made out against the defendant on plaintiff's showing, sustained the demurrer, and dismissed the suit, and plaintiff has appealed, and assigned errors.

It is said, first, that it was error to consider the evidence in the meager light in which the Court below was compelled to consider it, in order to sustain the demurrer. If we understand this assignment, it is that plaintiff having introduced his proof, and, presumably, all he had, and the defendant having introduced none, it was error in the Court to decide the case, because the evidence was too meager. Certainly, if the plaintiff cannot make out his case by his own witnesses, uncontradicted and unquestioned, and with all legitimate inferences from their testimony, he cannot make out his case at all. He cannot complain that defendant has put the case upon his version of it, and rested it there.

It is said that it was error for the Circuit Judge to hold plaintiff's evidence insufficient, since in doing so he must pass upon questions of fact, which are exclusively within the province of the jury. The

practice of demurring to evidence, and having the judgment of the Court thereon, is established in this State, and we are not disposed to reopen the question. *Hopkins* v. *Railroad*, 12 Pick., 420.

It is said it was error to hold the plaintiff not entitled to recover, and to sustain the demurrer, and dismiss the suit. This presents the case on its merits. Plaintiff was in defendant's employ as a millwright. Miller was the superintendent of the mill. Poole was the head miller. Through the superintendent and head miller plaintiff was directed to place what is called a feeder in a certain place while the mill was in operation. The work to be done was dangerous, and plaintiff protested, and asked that it be deferred to some time when the mill was stopped. This defendant declined to do, being behind with orders, and desiring to see the operation of the new feeder, which was designed to mix flour and meal. Plaintiff thereupon went to work, on Sunday morning, February 1, 1897, and continued on Monday, with the mill running. By Thursday the work was all done successfully, except placing two boards in place. Plaintiff took the measure for them, and went to dinner, leaving a belt around the pulley which operated this feeder. It was easier to place this belt on while the machinery was running than to remove a loose belt while running. The place where the work was done was close, dark, and dangerous. While plaintiff was absent at dinner, Miller, the superintendent, went to

the place to examine the work, and, in order to do so, threw off the belt. Being thus thrown off, the belt would flap around a shaft near by, then suddenly loosen and fly off obliquely, making the place still more dangerous. The superintendent, seeing the increased danger, retreated a few steps, and took his stand behind a lot of spouts. Plaintiff returned with his planks, passed by the superintendent, who gave him no warning. Plaintiff, in order to reach the place, had to crawl around and among the fixtures, carrying his planks with him, and did so successfully, until he came suddenly to where the loose belt was. He was astonished to find it off, and asked, "Who threw this belt off?" Miller, the superintendent, replied, "I did." Plaintiff then asked him, "What did he do it for?" and he replied: "I was afraid it would catch my clothing." The plaintiff said it ought not to have been done, or, if done, it ought to have been thrown off the small pulley. Miller replied, "What are you going to do now?" Plaintiff replied, he believed he could cut the belt off, to which Miller made no reply. Plaintiff, however, became convinced he could not cut it with the small knife he had, and did not try to do so, but wound the belt up on the shaft with a board. This he did of his own volition, and not at Miller's direction. Plaintiff states that his object was to get the belt off and put on a new one, but this was not Miller's suggestion. Plaintiff states that he knew that the belt being

loose made the situation very dangerous, and would have known it even though he had not been hurt, and knew it before he went in to do the work, but did not say to Miller that it was dangerous, but merely that he ought not to have thrown the belt off. Miller did not direct him to go on and put in the planks. Poole was not present at the time and had given no instructions after Saturday before the work commenced on Monday. At the time the accident occurred there were no commands given and no requests made, and what plaintiff did he did of his own volition. When the loose belt wound round the shaft it came loose, suddenly quartered out, and caught plaintiff's left arm and pulled it off.

It is said it was negligence to order the work done while the mill was running; that it was negligence also to increase the danger while the work was being done. Both these propositions are granted, without considering whether the last was personal or official negligence. It is said the plaintiff was not guilty of contributory negligence and that he did not assume the risk when he undertook to do the work, nor when he remained, after the new danger had arisen, and finished the work. If these latter contentions be correct, then plaintiff is entitled to recover. But are they correct?

It will be observed, in the first place, that the injury in this case did not happen while the work on the feeder was being done. That was success-

fully finished, and the plaintiff then undertook to take off the old belt and put on a new one, and, in attempting this, was hurt. This was a matter of his own suggestion, necessary, no doubt, to the proper operation of the feeder, but not ordered to be done. He adopts his own plan to effect his purpose, and, in doing so, is injured. It cannot be denied that he was fully aware of his dangerous surroundings and the danger of the work, and that he made no objection to finishing the feeder or throwing off the belt, when he knew of the peril attending it. He cannot recover because he was required to work in a dangerous position originally, even though he protested, if, nevertheless, he proceeded to do the work. In such case he assumed the risk, unless there was a promise to remedy the danger and he relied on it. *Railroad* v. *Elliott*, 1 Cold., 611; *Knox* v. *Coal Co.*, 6 Pickle, 546. And the same rule will apply when he undertakes to complete the work after the hazard has been increased, if he is aware of it and fails to object, or even if he does the work under protest.

It is not a case of sudden emergency, when the plaintiff is compelled to act, or when he finds himself in a situation of peril and is forced to act, or when his retreat is cut off.

Of all the persons connected with the management, plaintiff was most competent to know, and did actually know, more than any one else, of the danger of his employment and situation. He was a

skilled millwright, and knew the details and dangers of his work. He went into a situation which it was evident the superintendent considered dangerous, and, so considering, evidently thought himself incompetent to direct or advise.

It is said if the evidence is conflicting, only that must be looked to which is most favorable to plaintiff, on demurrer to evidence. This is not a correct statement. The evidence must be looked to as a whole, and all reasonable inferences drawn from it in plaintiff's favor, but none of it must be excluded simply because unfavorable, but only if shown by other evidence to be incorrect.

We are not able to see upon what theory or legal ground the principal in this case can be held liable for this unfortunate accident, and, if there was negligence in the matter, as distinguished from a pure accident, it must be held to be that of the plaintiff, in attempting to perform an act of the dangerous character of which he was most aware and best competent to judge.

The judgment must be affirmed with costs.

KNOX *v.* RAILROAD.

(*Knoxville.* October 15, 1898.)

1. MASTER AND SERVANT. *Fellow-servant.*

A "boss wiper" who is the foreman of a gang of wipers employed by a railroad company to wipe its locomotives and direct them when to work and what to do, but who has no power to employ or discharge them, is their fellow-servant, and not a vice principal. (*Post, pp. 378, 379.*)

2. SAME. *Facts that do not fix master's liability.*

The foreman of a gang of engine wipers employed by a railroad company, even if a vice principal, is not guilty of negligence rendering the company liable for the death of one working under his directions, where the latter was in the pit under the engine, or among its rods and beams, when it started out of the round house pursuant to the foreman's order, and was killed while the engine was backing upon the turntable, it appearing that the engineer had rung the bell before starting as a warning, and that the foreman had ordered all the wipers out to the turntable, and the circumstances indicate that the deceased must have been asleep, or that if awake, recklessly remained under the engine. (*Post, pp. 376–379.*)

FROM KNOX.

Appeal in error from the Circuit Court of Knox County. JOSEPH W. SNEED, J.

N. N. OSBORN and W. H. SHAVER for Knox.

JOUROLMON, WELCKER & HUDSON for Railroad.

WILKES, J. This is an action for personal injuries resulting in the death of the husband of plaintiff. Upon the trial the plaintiff introduced her evidence, and the defendant demurred to the same. There was joinder in the demurrer, and, on hearing, the Court sustained it and dismissed the suit at plaintiff's cost, and she has appealed. The judgment upon the demurrer recites that if there was negligence of a third person causing the death, it was that of a fellow-servant, for which the principal is not liable.

It appears that the deceased was an old man, and was employed as a hostler or engine wiper. His duty was to wipe off the underside of the engines as they stood in their stalls in the enginehouse over a pit dug out for this purpose. He was so engaged just previous to the accident. The proof shows that a wiper can get into the pit under the engine while it stands in its stall and wipe off the under part of the engine. In order to reach some of the higher parts, it is necessary for him to climb up among the under works of the engine. There were a number of stalls in the roundhouse and a number of wipers employed, some to wipe the outside and some "under-wipers," to clean under the engines. The deceased was one of the latter. Over the wipers was a boss. The other wipers work under his direction. It was his duty to give the men their orders, look after the engines, and see when they are ready to move out of the roundhouse. It was his duty to see if there was anything on the

track, open the doors to the enginehouse, and give signals for the engines to move out, and to give orders for the men to adjust the turntables.

This injury occurred at night. The deceased had been wiping the underside of an engine. Another engine was standing near on an adjoining track, also being wiped. The deceased had a lighted lantern with him under his engine. It was found after the killing in the pit, sitting on the ground.

Deceased had been doing this work for fourteen months, working in the night and sleeping in the daytime. There was a turntable just outside the doors of the enginehouse, on which each engine went on entering and leaving the house, so as to get the proper direction or track. It appears that when this engine was to be moved out, the doors of the room were opened, the bell rang, the engineer got upon his engine, and the boss wiper ordered the men out to the turntable to adjust it. This was turned in the proper position, and the steam was applied, and engine moved out to the table. It stopped some seconds before it reached the turntable, until the table could be adjusted. When the engine proceeded to back off the table, the end at which it went off was depressed, and the other end tilted up somewhat, and, just at this time, while the pilot of the engine was passing near the center of the turntable, cries of distress were heard. The engine passed off, and the deceased was discovered about the center bolt or pin of the turntable be-

tween the rails of the track. His legs were broken, and his body badly mangled. He died soon afterwards from his injuries.

The first question is whether the boss wiper, as he is called in this case, was a superior servant to the deceased, in the sense that he stood as a vice principal representing the master at the time and in the matter of this accident. The boss wiper was evidently the foreman of the gang of wipers, and directed them when to work and what to do. It does not appear that he had any power to employ or discharge them. He had certain duties of his own to perform, which may be termed of a higher grade or dignity than that of an ordinary wiper, such as opening the doors, giving the signal for the moving of the engines, ordering the hands to go to and adjust the turntable. It does not follow because a servant is a "foreman" that he is a vice principal, so as to make the master responsible for his negligence, but he must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty toward the inferior servant which, under the law, the master has over the servant. *Allen* v. *Goodwin*, 8 Pick., 387, and cases there cited.

We do not think that the boss wiper, in discharge of his duty, stands in the place and stead of the master as to the wipers, but as their fellow-servant, albeit he is their foreman and directs them when and where to work. But, even if he be

considered as a vice principal, we cannot see in what respect he was negligent upon this occasion. It is not shown that it is one of his duties to look under the engine and ascertain whether a wiper may be under it before he gives the signal for it to leave the enginehouse. The wiper is presumed to know something of the movements of the engines himself, and to be on the lookout for their starting. In addition, the engineer rings the bell before starting, as a warning, and this was shown to have been done. In addition, in this instance the boss had ordered the wipers out to the turntable, and, if in the line of his duty, the deceased should have gone there. Instead of this, he was evidently up among the rods and beams on the underside of the engine when it started, and, though it stopped before it reached the turntable, the deceased made no effort to leave his place of danger and made no outcry. The unavoidable inference is that he must have been asleep, or, if awake, reckless in his conduct in remaining where he was until he was crushed by the centerpiece of the turntable in passing over it.

We do not see how, upon any hypothesis, the railroad could be held liable for such accident, and the Circuit Judge was correct in sustaining the demurrer and dismissing the suit, and his judgment is affirmed with costs.

GANN *v.* RAILROAD.

(*Knoxville.* October 15, 1898.)

1. MASTER AND SERVANT. *A superior becomes a fellow-servant, when.*

A superior who undertakes to perform, and puts himself in position to perform, the work of a fellow-servant, is, as to that particular work, a fellow-servant, and his negligence in such case, is that of a fellow-servant, and not that of a vice principal, although he may be vice principal generally. (*Post, pp. 383, 384.*)

Cases cited: Railroad *v.* Boltin, 99 Tenn., 277; Allen *v.* Goodwin, 92 Tenn., 385.

2. SAME. *Negligence, that of vice principal, when.*

The negligence of one occupying generally the position of vice principal to the servants employed under him, in failing to provide safe and proper appliances, is chargeable to the master, although in handling such appliances he may be a fellow-servant. (*Post, pp. 385, 386.*)

Case cited: Railroad *v.* Northington, 91 Tenn., 56.

3. SAME. *Servant assumes risk, when.*

A servant assumes the risk in using an appliance which is known to be defective. (*Post, pp. 386, 387.*)

FROM MARION.

Appeal in error from the Circuit Court of Marion County. FLOYD ESTILL, J.

W. T. MURRAY and B. F. TATUM for Gann.

W. D. SPEARS for Railroad.

WILKES, J. This is an action for personal injuries, tried by the Court and jury, and resulting in a verdict and judgment for plaintiff for $1,250. The defendant railroad has appealed and assigned errors.

The first error assigned is to the admission of certain statements made by Cox, immediately after the accident occurred, as to the cause of it, and how it happened. It is insisted they were not part of the *res gestæ*, and were, therefore, inadmissible. We need not pass upon this assignment, as the statements made by Cox would not change the result of the case or place it in any different light than if they had been rejected.

It is next insisted that the negligence which caused the accident in this case was the personal negligence of Cox, and not official negligence, and that the Court not only failed to make the proper distinction between the two classes of cases, but refused to charge a request which would have pointed out the difference.

It appears that Cox was a section boss and Gann was a section hand under him; that Cox had authority and control over Gann; that he was subject to his orders; that Cox had the right to employ and discharge at will, and had complete control of the section and hands upon it.

It appears that Cox one evening ordered the section hands to get on a handcar, to go to a point on the road known as "Ramsey's Bottom," to measure up a lot of old iron. Cox, as was his custom, took a position at the brake, for the purpose of holding it and guiding the movements of the car. Gann and the other hands, under direction of Cox, operated the propelling lever which drove the car. The accident occurred on a steep down grade, and the car was running at about fifteen miles an hour. The brake was a peculiar one, and appears to have been of Cox's own invention. The main insistence is that Cox negligently applied, or failed to apply, this brake in such manner as to suddenly check the car. It appears that it acted upon a principle the reverse of the ordinary brake, and that it was necessary to hold it off, or it would apply itself automatically and immediately stop the car unless held off. The sudden checking of the car, in consequence of Cox letting the brake loose, forced the lever down on plaintiff's knee, and drove the leg bone down into the ankle, permanently injuring the plaintiff. He fell from the car, and it was at once stopped, and Cox went back to where he was laying, and, according to the proof of two witnesses (though contradicted by Cox himself), stated that he did not go to do it, that his coat was about to get caught in the wheel, and he reached back for it with his left hand, and that threw him around so that the bake handle came out from under his right

arm, and the brake went on. This is the statement to which objection was made. There is nothing in it prejudicial to the defendant in this case upon its theory.

It is insisted that Cox, in operating this brake, was a fellow-servant with Gann and the other hands, not filling the place of the master, but, for the time being, in the work and doing the service of a servant.

The Court charged the jury, in substance, that, under the facts as thus stated, Cox and Gann were not fellow-servants, and the defendant would be liable for Cox's negligence. He was requested to charge, in substance, the reverse of this proposition, and declined.

It has been held in this State that a section boss and his subordinates occupy the relation of master and servant as to each other. It is evident, however, that a man may occupy the position of a master or vice principal in some respects and in the doing of some acts, and that of a fellow-servant in other respects and in doing other acts. If a superior undertakes to do the work of a fellow-servant, and puts himself in the place to do the work of a fellow-servant, he becomes one as to that particular work, and his negligence in such case is that of a fellow-servant, and not that of a vice principal. An individual may act in a dual capacity, not, it is true, at the same moment and in the same act, but he may, while generally acting as vice principal and

standing in the place of a master, lay aside that character and authority, and occupy, for the time being, the place and do the work of a fellow-servant, and while thus engaged in the particular act he is, in the eye of the law, a fellow-servant, and the principal is not responsible for his negligence.

This distinction is clearly pointed out in the case of *Railroad* v. *Bolton*, 15 Pickle, 277, and cases there cited. See, also, *Allen* v. *Goodwin*, 8 Pickle, 385.

The distinction is plainly and forcibly stated in *Stockmeyer* v. *Reed*, 55 Fed. Rep., 259, as follows: "The question is not one of rank. If the superintendent was acting at the time in the capacity of a fellow-servant, and his negligence caused the injury, the master is not liable. Notwithstanding his superior power, such superintendent is still a servant, and, in respect to such acts and work as properly belongs to a servant to do, he is, while performing them, discharging the duties of a servant." See the same case on appeal, 74 Fed. Rep., 186. The same distinction is held in Arkansas. *St. L., A. & T. Ry. Co.* v. *Torry*, 58 Ark., 217 (24 S. W. Rep., 244), and cases there cited. So, likewise, in Indiana. *Nall* v. *Railroad*, 129 Ind., 264; *Taylor* v. *Railroad*, 16 Am. St. Rep., 372. New York, Pennsylvania, Michigan, and other States hold the same doctrine. *Hawkins* v. *Railroad*, 142 N. Y., 416 (25 L. R. A., 396); *Ross* v. *Walker*, 139 Pa. St., 42 (23 Am. St. Rep., 160); *Harrison* v. *Detroit*, 79 Mich.,

409 (7 L. R. A., 623). And the same doctrine is held in North Dakota, Minnesota, Georgia, Oregon, Virginia, Vermont, Kansas, California, Massachusetts, West Virginia, Illinois, South Carolina, Rhode Island, and other States. The States of Ohio and Missouri may be said not to recognize the distinction clearly and fully. And Texas, under an Act of the Legislature of that State, defining the relation, seems to be undecided, if not antagonistic to the view. *T. & P. Ry.* v. *Reed*, 88 Tex., 439 (31 S. W. Rep., 1058); *Sweeney* v. *Railroad Co.*, 84 Tex., 433 (19 S. W. Rep., 555). See the subject elaborately discussed in Vol. 47, Central Law Journal, of August 12, 1898, page 130 *et seq.* See, also, Bailey's Personal Injuries Relating to Master and Servant, Sections 1834, 1972, 2154, 2176, 2535.

The Court was asked to charge that if plaintiff was one of a gang of laborers at work on the defendant road, and if the gang was under Cox, as foreman, and if Cox had charge of the brake, and the injury was brought about through the negligence of Cox in letting the brake loose and suddenly stopping the car, or throwing it on and suddenly stopping the car, the negligence would be the personal negligence of Cox, as distinguished from his official negligence, and defendant would not be liable; that, in order to charge the defendant, Cox must so far stand in the place of the master as to be charged in the particular matter with a duty toward the defendant, which, under the law, the master

owed to him, and his negligence in such case could not be such an obligation. This was refused, and was, we think, error. We think the case is almost identical with that of *Railroad* v. *Bolten*, 15 Pick., 276, and with that of *Railroad* v. *Peterson*, 162 U. S., 316. See, also, *Railroad* v. *Charles*, 162 U. S., 359; *Railroad* v. *Rush*, 166 U. S., 403.

There is a conflict in the evidence as to whether this brake was in good and safe condition, and this is material, because, even if Cox was doing the work of a fellow-servant in handling the brake, and for his negligence in so doing the company would not be liable, still, if he failed to provide safe and proper appliances, he would, in that matter, be doing the work of his principal, and for his negligence in not providing safe appliances the company would be responsible, as was held in *Northington* v. *Railroad*, 7 Pick., 56.

The proof tends to show that the brake was somewhat worn, so that it did not work as it would if in perfect condition, and that, in consequence of this wearing, Cox was required to hold it off with his hands all the time, otherwise it would automatically close upon the wheels, and immediately stop the car. The Court charged the jury that "if the brake was not the kind ordinarily used in the management of handcars, and was not reasonably safe, and the plaintiff knew its condition, and continued in the employment of defendant knowing just what this brake was —that it was defective and not reasonably safe—he could not recover."

The proof leaves no doubt but that Gann knew the condition of the brake, whether it was safe or defective, so that we cannot affirm the judgment upon the ground that the brake was defective, or was so found by the jury. If they did so find, they must also have found that plaintiff had full knowledge of its condition.

It is urged upon us that this view of the law is inconsistent with the holding of this Court in *Railroad* v. *Northington*, 7 Pickle, 56, *et sequitur*. We do not so regard it. In the Northington case the section boss was recognized as the superior, as he is in this case. His negligence in the Northington case was that of a vice principal, and was official. In this case it was that of a fellow-servant, and was personal. In the Northington case the section boss caused the gang to push before them a truck or pushcar, containing two dumpbeds or boxes, in moving from one place to another. Instead of furnishing these dumpbeds with proper appliances to fasten them together, and thus to make it safe to push them over the track, there was no way to fasten them. To remedy this omission, the foreman stood upon the boxes, with a foot in each, thus attempting to supply the place of proper fastenings and couplings, which it was his official duty to provide. In addition, he was directing the movements of the car, and saw that the dumpbox was slipping, but calculated that it would not strike the platform, and took the risk of its

doing so, without giving any warning to the crew. He was negligent, therefore, in not providing, in the first instance, safe and proper appliances, and, next, in requiring the car to be run on, after he saw the risk and danger, and without notifying the crew of such danger. There was no evidence in that case that the foreman was in the habit of thus substituting his feet for a coupling appliance to hold the cars together, or that the crew was aware of such practice, in which event, they might be held to have assumed the risk if they did not object (as was charged in the present case). He was also negligent, while guiding and directing the movements of the car, in not stopping when he saw the danger, and in not notifying his crew of such danger, and in both these negligent acts he was clearly in the line of his official duty as vice principal. But, in the case at bar, if the brake was defective, it had been so for some time and the fact was well known to plaintiff. The section boss was giving no directions and was not controlling the movements of the crew, but was manipulating the brake personally, which was a servant's place, and the accident was due to the unintentional, negligent act of the foreman thus engaged, in allowing the brake to escape his control.

We are of opinion there is error in the judgment of the Court below, and it is reversed and cause remanded for a new trial. Appellee will pay costs of appeal.

ARMSTRONG *v.* STATE.

(*Knoxville.* October 18, 1898.)

PLEA IN ABATEMENT. ***Verification.***

A verification of a plea in abatement, stating that it is true, is good without adding the words "in substance and in fact."

Cases cited: Bank *v.* Jones, 1 Swan, 391; Wrompelmier *v.* Moses, 3 Bax., 470.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. FLOYD ESTILL, J.

CLEFT & CUMMINGS for Armstrong.

Attorney-general PICKLE for State.

CALDWELL, J. Albert Armstrong was indicted for the larceny of a watch. The person arrested under that indictment filed a plea of misnomer in abatement. This plea was stricken out, because, in the opinion of the Court, not sufficiently verified. The defendant refused to plead further, and thereupon the Court directed a plea of not guilty to be entered. Upon the issue thus formed the defendant was tried, convicted, and sentenced to serve four years in the penitentiary. Motions for a new trial and in arrest of judgment were then successively made and over-

ruled. The defendant appealed in error to this Court, and here insists that his plea was improperly stricken out. The verification of the plea was in these words: "The defendant makes oath that the statements in the above plea are true." This the trial Court ruled to be fatally defective, because not followed by the additional clause, "in substance and in fact." In this ruling the Court below was in error. The affidavit was sufficient as made, and the addition of the other words could have made it no better. The statute prescribes no particular form of verification. Its language is: "No plea in abatement shall be received in any Court, unless its truth is verified by the oath of the party or otherwise." Code, § 2901; M. & V., § 3611; Shannon, § 4622. If the defendant makes oath, as in this case, that the statements in his plea are true, "its truth is verified by the oath of the party;" and that is all the statute requires. If he swears the plea is true, the truth of the plea is verified by his oath, and the use of the words "in substance and in fact" add nothing to its legal effect.

Judge Caruthers, than whom no better pleader under the Code has been known, gives, as a proper and sufficient form of verification of a plea in abatement, the following: "The defendant makes oath that the above plea is true." Hist. Lawsuit (Ed. 1866), Sec. 185. In Martin's edition of the same work the clause, "in substance and in fact," is added. Hist. Lawsuit (Martin), Sec. 83. The

latter form is the one given by Chitty (2 Chitty Pl., 445), and is in rather general use. 1 Enc. Pl. & Pr., 29; 1 Enc. Forms, 26, 27, and citations. The form is undoubtedly good, yet it is not the only one that is good. The requirement is, that the affidavit as to the truth of the plea must be positive and leave nothing to be collected by inference. *Bank* v. *Jones*, 1 Swan, 391; *Wrompelmier* v. *Moses*, 3 Bax., 470. In the bank case the statement was that the affiant "is informed and believes that the above plea is true in substance and matter of fact." The Court said the affidavit was insufficient, because made on information and belief, rather than upon knowledge; that the affidavit must be positive, stating "that the plea is true in substance and fact;" not meaning by the latter, however, to prescribe an exact form, but only to say what was requisite, as contradistinguished from a verification on information and belief. 1 Swan, 392. In the Wrompelmier case the affidavit was, that the "facts stated in the plea are true, to the best of his knowledge, information, and belief." The Court said the verification would have been good if it had stopped with the statement that the "facts stated in the plea are true," but that it was rendered uncertain and insufficient by the qualifying words added. 3 Bax., 470. The verification in the present case is positive, absolute, and unqualified, and, being so, it is entirely sufficient.

Reversed and remanded.

LOGAN *v.* OGDEN.

(*Knoxville.* October 19, 1898.)

BILLS AND NOTES. *Co-sureties' liability.*

Persons who sign their names in blank on the back of a negotiable note, before delivery, for the accommodation of the maker, and to give him credit with the payee, are not indorsers proper, but co-makers with their principal, and equally liable as between themselves, without reference to the order in which their names were signed.

Cases cited: Bank *v.* Lumber Co., 100 Tenn., 479; Assurance Society *v.* Edmonds, 95 Tenn., 53; Morrison Lumber Co. *v.* Lookout Mountain Hotel Co., 92 Tenn., 9; Bank *v.* Jefferson, 92 Tenn., 537; 95 U. S., 93.

FROM KNOX.

Appeal from Chancery Court of Knox County. H. B. LINDSAY, Ch.

CORNICK, SANSOM & CORNICK for Logan.

D. W. KUHN for Ogden.

CALDWELL, J. W. H. Salmon executed a negotiable promissory note to Jennie Freymond, for $875, payable in ninety days. Before delivery, and to give credit with the payee, S. R. Ogden and

S. T. Logan wrote their names across the back of the note, for the accommodation of the maker. Before the name of either Ogden or Logan was so written, each of them knew that the other was to join him in that favor to the maker. Nothing was said about the order in which their names should appear upon the back of the note, but, as a matter of fact, Ogden wrote his name first, and, a few minutes later, Logan wrote his name under that of Ogden. The note was then delivered. When it matured, the maker made default, and Logan paid the note in full. Thereafter, Logan brought this bill in the Chancery Court against Ogden, to recover from him the whole amount so paid, with interest. This measure of recovery was sought upon the theory that the complainant and defendant were second and first indorsers, respectively, and that, being so, the defendant, as between them, was primarily liable on the note. The defendant, answering, denied that he was first liable, but conceded his liability for one-half the sum paid by the complainant. The Chancellor adjudged Logan and Ogden jointly liable, and, thereupon, pronounced a decree in favor of the complainant, against the defendant, for one-half the amount paid in satisfaction of the note. Upon appeal by Logan, that decree was affirmed by the Court of Chancery Appeals. Logan has appealed again, and here insists that the theory of his bill is sound in law, and that he should now be allowed a recovery for the full amount paid by him.

It is now well settled that persons who sign their names (as did Ogden and Logan) in blank on the back of a negotiable promissory note, before delivery, for the accommodation of the maker, and to give it credit with the payee, are co-makers with the original promisor, and with him jointly and severally liable to the payee. *National Exchange Bank* v. *Cumberland Lumber Co. et al.*, 100 Tenn., 479; *Assurance Society* v. *Edmonds*, 95 Tenn., 53; *Bank of Jamaica* v. *Jefferson*, 92 Tenn., 537; *Morrison Lumber Co.* v. *Lookout Mountain Hotel Co.*, 92 Tenn., 9; *Good* v. *Martin*, 95 U. S., 93.

As between themselves and the payee of the note, Ogden and Logan were co-makers with the original promisor; as between themselves and the original promisor, they were joint sureties for him; as between themselves alone they were joint sureties. In all of these relations they were equally liable for the payment of the note. In no aspect of the facts disclosed did they sustain the relation of first and second indorsers. Each signed his name at the instance of the original promisor, and for his accommodation, and in so doing, assumed unconditional liability to the payee, with the knowledge that the other was doing the same. They acted concurrently, from the same motive and to the same end.

No importance can be attached to the mere fact that Ogden's name appears first on the back of the note, when it is remembered that each of them knew, before either signed, that the other would

sign with him, and that the sole object of their signing was to give credit to the note. The understanding of both was the same. Both signatures were to be attached for the same purpose, but they could not be attached at precisely the same moment of time, nor on the same space. One had to precede the other, and which it was or might be was wholly immaterial under the circumstances of the case.

Affirmed.

101 396
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INSURANCE CO. *v.* HYDE.

(*Knoxville.* October 21, 1898.)

1. LIFE INSURANCE. *Forfeiture of policy for nonpayment of dues.*

The insurer is estopped to claim forfeiture of a life policy for nonpayment of dues where he, through a long continued and uniform course of dealing with the assured, had not exacted punctual payment of dues, but permitted the assured to pay upon notice or demand, and accepted such payment, though made after maturity, without objection, provided the particular dues, for nonpayment of which forfeiture is claimed, were paid or tendered within reasonable time after such notice or demand, and in reasonable conformity to such course of dealing. (*Post, pp. 397–399, 403–405.*)

Cases cited and approved: 61 Pa. St., 107; 38 Iowa, 304; 33 Ohio St., 459; 96 U. S., 572; 75 Ill., 426; 76 Ga., 575; 106 U. S., 30.

2. SAME. *Forfeiture for nonpayment of assessment.*

Before nonpayment of an amount, which, under the terms of a life policy must be ascertained and fixed by assessment, can be successfully relied on as a ground for forfeiting the policy, the insurer must plead and prove that an assessment had been duly made in accordance with the charter and by-laws of the company, and the terms of the policy. (*Post, pp. 399–402.*)

Cases cited: 85 Ky., 1 (S. C., 7 Am. St. Rep., 571); 31 Barb., 178; 49 Mo., 332 (S. C., 8 Am. Rep., 132); 36 Ind., 430; 139 U. S., 297; 28 S. W. R., 498; 59 Am. St. Rep., 422.

3. SAME. *Policy requiring assessment to be made.*

The amount to be paid periodically by the assured to form a mortuary fund is not fixed or determinable from the policy itself, but must be ascertained and fixed by assessment, when the policy provides that such amount shall be computed according to a table of graduated ratios indorsed thereon, in view of the assured's age and the aggregate maximum indemnity for said purpose, allowing for discontinuance of membership. (*Post, pp. 400, 401.*)

4. SAME. *Offer to pay not admission of correctness of amount due.*

The fact that assured, two days prior to his death, mailed to the company a check for the amount of the premium claimed, does not constitute such recognition of the correctness of the amount as relieves the company of the necessity to prove it. (*Post, pp. 402, 403.*)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

E. WATKINS for Insurance Company.

BROWN & SPURLOCK for Hyde.

McALISTER, J. The object of this suit was to enforce the payment of a policy of insurance issued upon the life of F. S. Hyde. There was a verdict and judgment in favor of the plaintiff for the sum of five thousand dollars, the face of the policy, and two hundred dollars interest. The company appealed, and has assigned errors.

On the trial below the company resisted the payment of the policy, upon the ground that the assured had failed to pay quarterly dues, which were payable on June 5, 1897, and had also failed to pay what was known as a mortuary call, due on the same day, and that, in accordance with the express stipulations of the policy, it was thereby forfeited.

The plaintiff, on the other hand, insisted that it had been the uniform custom of the company, since the issuance of this policy in 1886, to give Hyde, and its other policy holders, notice, not only of this mortuary call or assessment, but to include in the notice quarterly dues, crediting total amount of the mortality call and quarterly dues with any dividends on account of interest accruing from the safety fund, as provided for in the policy, but that no notice was given the assured of mortality call and dues payable June 5, 1897.

It is insisted on behalf of the company that, on April 27, 1897, in accordance with its uniform custom, it caused to be mailed to the assured due notice of the mortality call and quarterly dues, payable June 5, 1897. It was denied by plaintiff that this notice was received by the assured, or was ever sent by the company. It was shown by the testimony of two brothers of the assured, who were with him constantly, that he was expecting such a notice, but did not receive it. This fact was also proved by Scott Raulston, a clerk in the office of the assured. It appears, however, that while assured was sojourning in Colorado for his health, a notice sent by the company reached Chattanooga on June 13, which was forwarded to assured at Colorado Springs, and, on his return to Chattanooga about June 28, 1897, a check for $17.25, covering mortality call and dues, was sent to the company. The company refused to accept this check, and returned it, claim-

ing the policy had been forfeited. The assured, F. S. Hyde, died June 30, 1897.

It was shown that Stephen Ball, secretary of the company, in a letter to counsel for plaintiff, admitted that the first notice sent to F. S. Hyde was directed to 521 West Fifth Street, Chattanooga, when, in point of fact, said Hyde never resided at said address. Ball, in a subsequent letter, explained that he was in error in stating that said original notice was directed to 521 West Fifth Street, but that said notice was addressed to F. S. Hyde, Chattanooga, as shown by register and galley slip of company. These controverted questions of fact were all passed upon by the jury, and, by every intendment, they must be held to have been resolved in favor of the plaintiff's contentions.

The second assignment of errors is that the Court erred in instructing the jury that, under the terms of the policy, in so far as the mortality call of $13.50 is concerned, before defendant could successfully rely on the failure of assured to pay this sum of money, the company must establish by proof that an assessment had been made by the officers or agents of the company, in the manner and form authorized by the charter and by-laws of said company, and the policy of insurance sued on.

It is insisted on behalf of the company that the policy or contract sued on in this case fixes the plan of ascertaining the amount of the call, and neither the officers of the company nor its constitution and

by-laws have anything whatever to do with the assessment, and that the proof shows that the call was properly made, according to the contract, to become due June 5, 1897.

In determining the correctness of this charge, we must look to the terms of the policy. The clause relating to this subject is:

"In consideration of the representations, agreements, and warranties made in the application, and of the admission fee paid, and of three dollars per annum on each one thousand dollars of the maximum indemnity herein provided for—for expense dues—to be paid as hereafter conditioned, and of the further payment of all assessments proportioned to said maximum indemnity levied against the herein named member to form a mortuary fund, for the payment of all indemnity matured by the death of members, and to create a safety fund as hereinafter described, which assessments, to be levied upon all members holding similar certificates in force at the date of such deaths, shall be made according to the table of graduated assessment ratios given herein, and as further determined by their respective ages, and the aggregate maximum indemnity at the dates of such deaths, with due allowance for discontinuance of membership," etc.

We think this provision of the policy furnishes a complete refutation of the argument of counsel and sustains the charge of the Court. The mortuary call is not fixed at a determined figure in the policy,

but is be ascertained according to the table of graduated ratios thereon given, in view of the member's age and the aggregate maximum indemnity, and allowing for discontinuance of membership, etc. The amount of mortuary call would, of course, depend upon the number of deaths, and would be reduced by dividends that the assured might earn. This policy contemplates that an assessment must be made by directors of the company, and notice given, in order that assured may know amount he is expected to pay. Says Mr. Joyce, in his work on Insurance: "The act of making an assessment is a ministerial and not a judicial one; therefore, no presumption can arise in favor of the regularity or legality of assessments, and it is an affirmative matter, both by pleading and evidence, necessary to establish a forfeiture for nonpayment of an assessment, that the assessment should appear to have been made in the manner, mode, and in conformity with the authority given, and for a proper purpose." *Ib.*, Secs. 1291, 1294, 1310; *American Mutual Aid Society* v. *Helburn*, 85 Ky., 1 (S. C., Vol. 7, Am. St. Rep., pp. 571–576).

May on Insurance, Sec. 557, says: "An assessment can only be valid when laid under the conditions stated in the charter. . . . The liability of the assured is conditional, and depends upon the contingency of the happening of losses and expenses to which he should be liable to contribute, which have been duly ascertained by the directors, and which make a resort to an assessment thereon. . . .

The promise of the assured is to pay upon such conditions, and the existence of these conditions must be established affirmatively before a call for payment . . . can be enforced." *Thomas* v. *Whallon*, 31 Barb., 178; *Pacific Insurance Co.* v. *Guse*, 49 Mo., 332 (S. C., 8 Am. Rep., 132); *Embree* v. *Shidiler*, 36 Ind., 430; *Mutual Reserve Fund Life Association* v. *Hamlin*, 139 U. S., 297.

In *Barbot* v. *Mutual Reserve Fund Life Association*, decided by the Supreme Court of Georgia (28 S. W. R., 498) it was said: "A table attached to a certificate of membership in a mutual life insurance association, termed 'an assessment rate table,' showing, by amounts starting with $1, the proportionate assessments to be made at different ages on each $1,000 insured, will be construed to fix the ratio of payment by each member on account of death losses, on the basis of age, and not as fixing the amount of the assessment where the constitution and by-laws provide that at stated intervals assessments shall be made on the entire membership, of such sums as may be deemed sufficient to meet existing death claims, which shall be apportioned among the members according to age." *Goodwin* v. *Insurance Co.*, 97 Iowa (S. C., 59 Am. St. R., 422).

The fact that the assured, two days prior to his death, mailed to the company a check for the amount of premium claimed, would not constitute such a recognition of the correctness of the amount

as would relieve the company of the necessity to prove it. *Insurance Co.* v. *Hamlin*, 139 U. S., 306.

The third assignment is: The Court erred in instructing the jury, viz.: "If you believe, from the evidence in the case, it was the uniform custom and course of business of defendant company to notify its policy holders, especially the assured, the said F. S. Hyde, that annual and quarterly dues were due and payable at stated times, and the course of dealing in this regard was so long and of such a character as to induce Mr. Hyde to believe a forfeiture would not be insisted upon unless notice was first given, and if it was the uniform custom of the company to give notice of the payment of such assessments and quarterly dues, and to include the two as a part of the account so stated, and not as a separate account, then the assured was not bound to pay said annual or quarterly dues until such notice was mailed."

It is insisted this charge is erroneous, for the reason the dues were payable quarterly, and the assured had carried the policy long enough to know when the dues were payable. It is insisted that the mere fact that notice of the quarterly dues was included in the same notice given for the payment of mortality calls, under the custom of the company, is not sufficient to change the rule of law. In support of this proposition, counsel cites Cook on Life Insurance, p. 160, in which the author says: "It is, however, difficult to see any sound basis for

the proposition that the mere usage of giving notice should in any case be sufficient to constitute the agreement to give such notice—in other words, to operate as a waiver of prompt payment in default of such notice; for such usage in no way contemplates as a time of payment a time later than that fixed by the contract, but, on the contrary, rather indicates, by way of reaffirmance, the original agreement that the time shall be exactly as fixed. It is, in short, a mere reminder of the obligations of the insured; in no sense a waiver of it."

We find the great weight of authority is against the view expressed by Mr. Cook. Mr. Joyce, in his work on Insurance, Vol. 2, Sec. 1332, says: "If a life insurance company has been in the practice of notifying the insured of the time when the premium will fall due, and of the amount, and the custom has been so uniform and so reasonably long in continuance as to induce the assured to believe that a clause for forfeiture for nonpayment will not be insisted on, but that the notice will precede the insistence upon the forfeiture, and the insured is, in consequence, put off his guard, such notice must be given, and, if not given, no advantage can be taken of any default in payment which it has thus encouraged, for the insured is entitled to expect the customary notification, and to mislead the insured by not giving such notice, and then insist upon a strict compliance with the conditions of forfeiture, constitutes, under such circumstances, a fraud upon

the assured which the Courts have refused in numerous cases to countenance." Cases cited by the author are: *Home* v. *Philadelphia Life Ins. Co.*, 61 Pa. St., 107; *Mayer* v. *Mutual Life Ins. Co.*, 38 Iowa, 304; *Union Central Ins. Co.* v. *Pattker*, 33 Ohio St., 459; *New York Life Ins. Co.* v. *Eggleston*, 96 U. S., 572; *Insurance Co.* v. *Pierce*, 75 Ill., 426; *Grant* v. *Alabama Gold Ins. Co.*, 76 Ga., 575; May on Insurance, Sec. 356; 2 Joyce on Insurance, Sec. 1334; *Phœnix Ins. Co.* v. *Doster*, 106 U. S., 30; Bacon Benefit Societies, Secs. 362–370. We have examined the cases cited, and, in our opinion, they announce the correct rule on this subject.

There is no error in the charge of the Circuit Judge, and the judgment is affirmed.

Electric Railway Co. *v.* Lawson.

(*Knoxville.* October 22, 1898.)

1. Supreme Court. *Assignment of error.*

An assignment of error that the verdict is contrary to the charge is superfluous, where there is an assignment that there is no evidence to sustain the verdict. The two assignments mean the same thing. (*Post*, *pp.* 407, 408.)

2. Master and Servant. *Servant obeying order in emergency.*

To justify the effort of a servant to obey the order of a superior in a hazardous matter, the order must be immediate and upon a sudden emergency or exigency. (*Post*, *p.* 408.)

3. Same. *Section boss is a vice principal*

A section boss or track foreman is a vice principal, under the decisions in this State, and the railroad company is answerable to a section hand under him for his negligence while acting officially. (*Post*, *pp.* 408, 409.)

4. Same. *Negligenee of vice principal official, when.*

The negligence of a track foreman, who was acting as a motorman of an electric car, in ordering a track hand to board the car while in motion, and in failing to stop the car in time to save him from the peril thus incurred, is official, and not personal, and the railroad company is answerable therefor. (*Post*, *pp.* 409–411.)

5. Contributory Negligence. *Question for jury.*

Whether or not the section hand was guilty of contributory negligence, in attempting, in pursuance of the direction of the track foreman, a vice principal, to board an electric car moving at the rate of three or four miles an hour, that precludes recovery for his death, caused by falling from the car and being run over by it, is for the jury to determine. (*Post*, *p.* 410.)

6. CHARGE OF COURT. *Failing to distinguish between official and personal negligence.*

It is not reversible for the Court to fail to charge as to the distinction between personal and official negligence of a vice principal, where the negligence was clearly official. (*Post*, *p. 411.*)

Case cited: Railroad *v.* Spence, 93 Tenn., 173.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. FLOYD ESTILL, J.

BROWN & SPURLOCK and E. WATKINS for Railway.

MARCHBANK & MATTHEWS and J. T. MATTHEWS and W. T. MURRAY for Lawson.

SNODGRASS, C. J. Suit by children for damages for the negligent killing of their father. Declaration has two counts, first, averring general negligence of railway company, and, second, negligence resulting from giving sudden order obeyed in an emergency. There was another count for associating deceased with incompetent fellow-servants, but this was abandoned. Judgment for plaintiff for $6,000, motion for new trial overruled, and appeal in error.

There are three assignments of error—no evidence to sustain the verdict, objection to charge given by the Court and refused, and excessive damages. The errors assigned also include statement that the verdict was "contrary to the charge of the Court;" but

this is superfluous. It can and does mean only that it is against or not supported by any evidence. If a charge is correct, and there is a verdict without evidence, it is, of course, "against the charge." Therefore, if the charge is satisfactory, the objection that there is no evidence to sustain the verdict necessarily implies that it is "against the charge."

The Court had charged correctly that to justify effort to obey order of a superior in a hazardous matter, the order must be immediate and upon a sudden emergency or exigency. There was no such immediate order, and plaintiffs were not entitled to recover on that count. If entitled at all it must be for negligence not thus specifically averred, and the whole case turns upon one point, whether, under the evidence, the track foreman, by whose negligence the injury it is claimed was occasioned, was the superior of deceased in the sense of a vice principal, and was or not his negligence, if proven, personal or official.

The plaintiff in error makes through its counsel a lengthy and learned argument to show that such a superior does not so represent the principal as to charge it with responsibility, and cites many cases to that effect. It attempts also to show that, when properly analyzed, the Tennessee cases are now in accord with this view. In this counsel are in error. Whatever the doctrine may be elsewhere, it is clear that in this State a section boss or track foreman is a vice principal, and, for his negligence while

acting officially for the master, the master is answerable. This has been too long settled even to need statement, much less citation of cases.

The only question is whether the negligence was personal or official. Lawson, who was killed, was one of a gang of track hands. He was a subordinate, under Nave, the track foreman. Lawson was working with other hands on the track, under the control and orders of Nave, who that day, and for some days previous, had been running a trolley car and flat car attached, carrying tools and material over the road, depositing the latter about a quarter of a mile beyond where the deceased was working. Nave was controlling the cars, and was in charge of the motor, acting as conductor or motorman. He had the right to order deceased on or off the car. Evidence believed by the jury (and that is taken as conclusive here, after verdict and judgment), shows that he commanded deceased, who was a sub-foreman, to take four or five men, catch the cars as they would pass, and go to their destination and unload. It was up grade, and he would not stop. This deceased had done on several trips. On the one in question, and while the cars conducted by Nave were going at the rate of three or four miles an hour, he attempted, in obedience to orders before given, to get on to the front platform, caught to an iron rod or hand railing about the platform, slipped, and was swung around in front of the car. He held on for some distance—somewhere from fifteen to forty-five

feet—and then fell on the track, was run over and killed, both cars passing over his body, and some car lengths beyond. There is evidence tending to show that Nave could have stopped the cars from the time he swung around until he fell. Of course, there is evidence to the contrary, but here, after verdict, the case must be put upon the strongest evidence, and upon this it must be determined whether there was any evidence to sustain the verdict. We are of opinion that there is evidence to sustain it. The danger of the effort to get on was not, at most, very great, and it cannot be said, as a matter of law, that it would prevent recovery. The question was one for a jury, as well as its effect (if not the proximate cause of the death) in mitigation of damages. The charge was full and fair on both points, and there is no reversible error either in the fact or amount of the verdict.

This leaves for determination the question as to whether the negligence of the foreman was official, in contradistinction to personal, and we are of opinion that it was. It was Nave's duty to control the cars; at least it appears to have been assigned to him, for he had been for some time doing it, and there is no evidence that any other conductor or motorman ever did this during that work, and it was also his duty to order the men on and off of the cars. What he did or omitted to do, therefore, if negligent, was the master's negligence. He was running by there without stopping before or after

deceased caught the car, having given orders to board them while in motion. The jury had the right to find this was negligence and that it was official.

The charge of the Judge is complained of, that he did not instruct the jury that, upon the facts, it would only have been in the capacity of a fellow-servant that Nave was acting, and that the Court's charge omitted to distinguish between personal and official negligence, in a paragraph quoted in the brief.

Waiving the question as to whether the charge could be looked to at all, it not appearing to have been signed, it is sufficient to say that it would have been error to have given the instruction asked, and as to the objection to the paragraph quoted as supposed error, the omission is supplied in another paragraph of the charge, in which the Judge refers to the "superior" as necessary to be one "standing in the place of the master." 9 Pickle, 173. But this is wholly immaterial. In this case, upon the facts, the track foreman was a vice principal, and whether the Court went into such distinction as to personal or official negligence, when he referred only to negligence, is not important. It could not be reversible error in a case in which the distinction was not called for.

Judgment affirmed.

REEVES & CO. *v.* ALLEN.

(*Knoxville.* October 22, 1898.)

1. DEED. *Calling for highway or street.*

The general rule is reaffirmed that a deed which calls for a highway or street carries title to the middle line or center of the street or highway, when the grantor owns to the center, but when the intent appears to be to convey only to the edge or margin, that intent will control. (*Post, p. 414.*)

Cases cited and approved: Railroad *v.* Bingham, 87 Tenn., 522; Spain *v.* Railroad, 1 Shannon, 181.

2. SAME. *Calling for streets, construed.*

Under a deed describing the property conveyed as a house and lot on the corner of two streets, fronting a certain distance on one of the streets, such distance must be measured commencing at the margin of the other street, but the deed will convey the grantor's right to the center of the street. (*Post, pp. 413–416.*)

FROM RHEA.

Appeal from the Chancery Court of Rhea County. T. M. MCCONNELL, Ch.

BURKETT, MILLER & MANSFIELD for Reeves & Co.

V. C. ALLEN for Allen.

WILKES, J. This is an ejectment bill. The complainants hold under an execution sale and Sheriff's

deed, and the only question is, where the beginning corner of the lot is, whether in the center of Market Street or at its eastern margin at the point of junction with Broyles Street. Defendant concedes that complainants can hold according to the Sheriff's deed, and disclaims all that portion of the lot embraced in its calls, but contends that the beginning corner is the center of Market Street, and not the eastern margin, and hence the line running with Broyles Street will stop about 56½ feet short of where complainants claim to, the defendants owning the lot to the east of this point. The Chancellor held with defendant's contention, and dismissed complainant's bill. The Court of Chancery Appeals reversed the Chancellor, and held that the lines must start at the east boundary of Market Street and run eastwardly with Broyles Street 140 feet, thus taking about 47½ feet of the lot claimed by defendant, but stopping short some 9 feet of Skillern's line, to which complainant claimed.

It is assigned as error that the line should start at the center or middle of Market Street, and not at its eastern margin. The levy and the Sheriff's deed describes the lot as follows: "One house and lot, situated on the northeast corner of Broyles and Market Streets, in Dayton, eighth district, Rhea County, Tennessee, fronting west 60 feet on Market Street, bounded on the south 140 feet by Broyles Street, on the east by Allen, and on the north by Hodges."

If the line starts at the center of Market Street complainants will have, of their 140 feet depth, 47½ feet of street to the east boundary of the same, and 92½ feet of lot not occupied by the street. The Court of Chancery Appeals report, that to extend this line to the Skillern line would make it 149 feet from the east margin of Market Street, and to this extent of 9 feet they refuse the relief prayed, and from this there is no appeal.

The Court of Chancery Appeals recognizes the general rule that a deed which calls for a highway or street carries title to the middle line or center of the street, where the grantor owns to the center, but when the intent appears to be to convey only to the edge or margin of the street, such intent will control. Accordingly, a deed calling for a side of the street does not carry title to the middle. *Iron Mountain Railroad* v. *Bingham*, 3 Pickle, 522; *Spain* v. *Ala. & Tenn. R. R.*, 1 Shan., 181; 3 Washburn Real Property, 635, and note.

We think the proper rule is that, when in a conveyance a lot is described as fronting so many feet upon a given street and running back a specified distance to another street, the measurement will begin at the margin of the street or line, up to which the grantee may occupy, and it will run back the distance to the margin or line of the next street, but the conveyance will be held, nevertheless, to cover the space on each street from the margin to the center, and to carry with it the grantor's

right to the street, subject to the public easement. In other words, while the measurement only begins at the margin of the street and extends to the margin of the other, the conveyance will carry all the grantor's interest in each highway or street to its middle line if the grantor owns to such middle line. So, in a levy and sale and conveyance thereunder, when the description calls for 60 feet front on Market Street and running back 140 feet, the 140 feet must be measured commencing at the margin of the street, though, as in case of a deed, it carries also the debtor's rights to the center of the street. Am. & Eng. Enc. Law (2d Ed.), Vol. 4, p. 814, and note; *Kohler* v. *Kleppinger*, Sup. Ct. Pa., 1886.

We are of opinion, therefore, that complainant is entitled to recover 140 feet from the margin of Market Street, and the defendant's rights in the street in front of the lot pass with it, in the absence of words showing a contrary intent, and writ of possession will issue accordingly. The costs will be divided equally, and to this extent the decree of the Court of Chancery Appeals is modified.

Defendant insists that in any event complainant cannot go beyond the fence which he claims marks the dividing line between that portion of his lot sold by the Sheriff and that part retained by him, on the idea that the fence is a natural boundary called for in the levy and Sheriff's deed. Waiving the question whether a fence can be treated as a nat-

ural object, the levy and Sheriff's deed does not call for it, but simply for Allen's (lot).

The fact that the line as herein laid out runs through a portion of defendant's house cannot change the holding. If the house was there when the levy was made, it passed with it and the Sheriff's deed. If it has been placed there since by defendant, it was at his own risk.

As modified, the decree of the Court of Chancery Appeals is affirmed.

HAMILTON *v.* STATE.

(*Knoxville.* October 26, 1898.)

1. DEFINITIONS. "*Within.*"

The term "within" as a limit of time or space or degree, embraces the last day or degree or entire space covered by the limit. (*Post, p. 418.*)

2. JURY TRIAL. *Relationship of juror.*

Relatives of the sixth degree are related "within" the sixth degree, and incompetent by statute to sit on juries. (*Post, pp. 418, 419.*)

3. NEW TRIAL. *For disqualification of juror.*

New trial will not be granted in a criminal case because of a want of general qualification of a juror "*propter defectum*"—*e. g.*, when he was related to the prosecutor within the sixth degree, but otherwise unexceptionable, although the defendant was ignorant of the fact of such relationship when the juror was selected, and for that reason failed to make objection. (*Post, pp. 419, 420.*)

Cases cited: Riddle *v.* State, 3 Heis., 401; Brakefield *v.* State, 1 Sneed, 215; Norfleet *v.* State, 4 Sneed, 340: Goodall *v.* Thurman, 1 Head, 209; Johnson *v.* State, 11 Lea, 47; Draper *v.* State, 4 Bax., 246; Cartwright *v.* State, 12 Lea, 620; Parrish *v.* State, 12 Lea, 655; Hoard *v.* State, 15 Lea, 318; Spencer *v.* State, 15 Lea, 539; Cantrell *v.* State, 2 Shannon, 249; Finkle *v.* Dunivant, 16 Lea, 503; McClure *v.* State, 1 Yer., 206; Gillespie *v.* State, 8 Yer., 507; Ward *v.* State, 1 Hum., 253; Calhoun *v.* State, 4 Hum., 477.

4. SELF-DEFENSE. *Right of, does not exist, when.*

One who procured a loaded pistol and brought on a difficulty with another, cannot rely on self-defense where he killed the latter as he was climbing a fence, with a hostile intention, it being apparent that he had no pistol on him, and, at most,

could have had but a knife, and the parties not being at close quarters, and defendant being accompanied by a companion, while the deceased had none. (*Post, pp. 420–424.*)

FROM KNOX.

Appeal in error from the Criminal Court of Knox County. T. A. R. NELSON, J.

SAMUEL G. HEISKELL and L. C. HOUK for Hamilton.

Attorney-general PICKLE for State.

WILKES, J. Defendant is convicted of murder in second degree, and sentenced for twenty years, and has appealed. It is objected that one of the jurors who tried him was related within the sixth degree to the prosecutor, who was also an important witness. No challenge was made of the juror when offered, but on motion for a new trial defendant made affidavit of the fact, and that he did not know of it when the juror was sworn. A juror is disqualified to serve when he is related to the defendant or to the prosecutor within the sixth degree, computing by the civil law. It is conceded that the juror was related in the sixth degree to the prosecutor. The term "within," as a limit of time or space or degree, embraces the last day or degree or entire distance covered by the limit. 29 Am. &

Eng. Enc. L., 524; 26 Am. & Eng. Enc. L., 4. The juror was, therefore, incompetent. Can this avail the defendant on his motion for a new trial, and on appeal to this Court? If a partial juror serves on the same, it is ground for new trial if the partiality was unknown to defendant when the juror was sworn. *Riddle* v. *State*, 3 Heis., 401; *Brakefield* v. *State*, 1 Sneed, 215; *Norfleet* v. *State*, 4 Sneed, 340; *Goodall* v. *Thurman*, 1 Head, 209; *Johnson* v. *State*, 11 Lea, 47; *Draper* v. *State*, 4 Bax., 246; *Cartright* v. *State*, 12 Lea, 620; *Parrish* v. *State*, 12 Lea, 655; *Hoard* v. *State*, 15 Lea, 318; *Spencer* v. *State*, 15 Lea, 539. But if the fact is known to the defendant, and no objection is made before the jury is sworn, it is not ground for new trial. *Cantrell* v. *State*, 2 Shan., 249; *Finkle* v. *Dunivant*, 16 Lea, 503. But our cases are uniform, that after the jury is sworn, new trial will not be granted because of the want of general qualification of the juror *propter defectum*, and this is held even though the defendant was ignorant of the fact when the juror was selected. *McClure* v. *State*, 1 Yer., 206; *Gillespie* v. *State*, 8 Yer., 507; *Ward* v. *State*, 1 Hum., 253; *Calhoun* v. *State*, 4 Hum., 477; *Cartright* v. *State*, 12 Lea, 620. The latter case is directly in point, and draws the distinction between the cases when a juror is incompetent *propter defectum* and when he is incompetent because he has prejudged the case. *Id.*, p. 628.

It might have been within the sound discretion of the trial Judge to have granted a new trial, upon this or any other ground which, in his opinion, prejudiced the defendant's right to a fair and impartial trial, but there appeared no evidence of partiality to the prosecutor, or collusion with him, or of prejudice against the defendant in the selection of this juror, and in his denial of relationship to the prosecutor, as it is made to appear that he mistook the name of the prosecutor when it was called upon his examination, and, moreover, the fact of relationship was of so little consequence to him that he could not state whether he was related or not, except from rumor or hearsay.

It is next insisted that defendant is not guilty, but that he killed his antagonist in self-defense. The case has been to this Court before, when a death sentence for the offense was reversed for an inadvertent error in the charge of the Court. See case reported in 13 Pickle, 452. Upon the remand, there was a mistrial, and then the present conviction. The homicide was committed in October, 1895. The deceased, Walter Hansard, and the defendant were paying attentions to the same young lady, and bad blood had developed in their rivalry, and had continued for a year or more, during which time they had quarrels. The homicide occurred on Monday. On Sunday night previous each of the young men had gone to the same country church, each with a different young lady. The defendant and the young lady he was

with were sitting next to a window, when deceased approached from the outside and turned the slats in the blinds. The defendant moved over next to the window, between it and the young lady, and spat out of the window. The deceased thereupon called him a "son of a bitch." Defendant got up and went out of the church, and he and the deceased went off into the woods together to settle their quarrel, but they returned without having any difficulty. After service was concluded, they each started home with his young lady, but defendant, after going with his a short distance, left her, and went a road that did not lead to her home, nor to his, but by the home of the deceased. The parties were both armed, but defendant did not intercept the deceased, and no further trouble occurred that night. On the next day defendant went to a store in the neighborhood, bought some cartridges, and freshly loaded his pistol. He then passed along the public road near which deceased lived. This was not his direct road home. Deceased was engaged, near the road, handling some hay or fodder at his uncle's barn. Defendant was accompanied by a friend, named Butcher. He called to the deceased to come down to the road, and deceased came in his shirt-sleeves. Some words passed. Defendant asked deceased if he meant, the night before, to call him a "son of a bitch." Deceased replied that he did, and that he was one, adding an additional epithet.

Up to this point there is no material difference in

the testimony. There were four eye-witnesses to the killing, three of whom were related to deceased and testified for the State. One, the man Butcher, testified for the defendant. The theory of the defendant is that, when deceased came down to the road and the quarrel was renewed, deceased put his hands upon the fence and mounted it, and, throwing one leg over it, turned his side to defendant, and ran his right hand in his pants pocket in a menacing manner, whereupon he shot. There were five shots fired by the defendant. Deceased was not armed, except that in his right pocket he had an ordinary knife. The theory of the State is that the deceased merely placed his hands on the fence, but did not attempt to cross it, when defendant drew his pistol; that deceased thereupon ran off up the hill, toward the barn and other houses, and defendant fired at him as he ran, and, when deceased reached a point opposite the barn, he turned to the left, to get behind the house, and at this point the last of the five shots was fired. Two shots took effect. One was in the leg, entering directly behind; the other in the side, passing through the forepart of the arm into the body, and this was the fatal one.

An ingenious argument is made to support defendant's contention and statement, in which he is largely but not entirely supported by Butcher, one contention being that the direction of the wound in the side and the range of the shot demonstrate that it could not have been done while the deceased was

retreating up the hill, or the wound would have been directly in the back, and that it could only have been done when deceased was on the fence with his side turned to defendant. A survey was made of the premises, and we have the testimony of engineering experts that from the place where defendant was standing he could not have shot the deceased running up the hill, because of an intervening fence obstructing the view and the range of the shots. These witnesses also testify that the range of vision of the principal witness was obstructed by a building, so that the deceased could not have been seen by the witness when it is said the fatal shot was fired. On the other hand, the State insists that the theory that deceased was shot while on the fence is contradicted by three eye-witnesses, and the shot in the rear of the leg shows it was made while deceased was retreating up the hill, and that the fatal shot was fired while deceased had his side somewhat turned to the defendant, as he attempted to get behind the house, and was so immediately fatal that the deceased could never have reached that point if the wound had been inflicted at the fence. It is not very definitely shown where defendant stood when he shot. That he did shoot five times there is no question, and he either shot at deceased as he ran, and because he saw him, or he aimed at the intervening fence, if he could not see him. Unquestionably one of the shots was fired while de-

ceased was retreating, and most probably both of them that took effect.

But, in any event, defendant cannot justify his action upon the ground of self-defense, even on his own theory. It is apparent there was bad blood between the young men, and they were ready to fight when occasion might offer. Defendant prepared himself for such an occasion and brought it about. He went by the place where deceased was, and called him to the road. Even on his own theory he was not in imminent danger. The deceased was in his shirt sleeves, and it was apparent to sight that he had no pistol on, and at the most could have had but a knife. They were not in close quarters, so as to make the danger imminent. Defendant had a companion with him, while deceased was alone. Under these circumstances he was not justifiable in shooting when he says he did.

But we are satisfied that the version of the State in this matter is correct, and that the shots were fired while deceased was in full retreat; they were continued as deceased fled up the hill, and the fatal shot was fired while deceased was turning to get behind the barn and shelter himself. In that position he would have his side to defendant, and it is reasonable to infer that he would also have his body turned somewhat to look at his antagonist as he fled.

We are satisfied with the evidence. There is no error in the proceedings, and the judgment is affirmed.

ROGERS *v.* STATE.

(*Knoxville.* October 29, 1898.)

WORKHOUSE LAW. *Power of commissioners to discharge convict.*

Workhouse commissioners have no authority to release a convict while he is still in custody of the Court, and before he has been placed in the workhouse, even if the statute authorizing them in certain cases to release convicts actually confined in the workhouse shall not be held unconstitutional, as an invasion of the Governor's prerogative to grant pardons.

Code construed: § 7423 (S.).

FROM UNION.

Appeal in error from Circuit Court of Union County. W. R. HICKS, J.

S. J. AILOR and JOHN P. ROGERS for Rogers.

Attorney-general PICKLE for State.

WILKES, J. In this case there was a conviction of assault and battery, with sentence of $50 fine and six months imprisonment in the workhouse. The imprisonment was suspended until the next term after the final judgment. While thus suspended, the defendant never having been sent to the workhouse,

the Commissioners of the Workhouse made an order releasing and discharging him.

The workhouse law, as it is called, provides that the Commissioners may discharge any prisoner when satisfied, from the certificate of the physician in charge, that he or she is physically unable to do labor, or for any cause, when they may deem it best for the institution and the public good. Shannon, § 7423.

It is insisted by the State that this provision of the workhouse law is invalid and unconstitutional; that it is an exercise of the pardoning power, which is alone vested in the Governor (Constitution, Art. III., Sec. 6), and we are called upon to pass upon the constitutionality of this provision.

We are of opinion we cannot do so in the present case, as the Commissioners clearly exceeded their authority, even if the act were valid and constitutional. In no event could they release a defendant from the custody and sentence of the Court before he had ever been delivered to and placed in the workhouse and under their control and charge. They had acquired no jurisdiction of the defendant, even if the law were valid. Their act was an unwarranted interference with the judgment of the Circuit Court while that Court still had control of the prisoner, and of the judgment, the sentence being suspended.

It appears that the Commissioners issued two pardons, presumably on the idea that, if one was not sufficient, two might be. The first was issued

on the day after the judgment of suspension was ordered, and was presented in open Court at the next term, before the suspension terminated. The Court refused to release the prisoner, and the counsel of defendant thereupon presented the second release, issued as of that date. The Court refused to honor either release, and directed that defendant be placed in the county workhouse for six months, and from this order the defendant appealed. The release, or order of discharge, issued by the board recited that the discharge of the defendant was for the best interests of the institution and the public.

The action of the Circuit Judge was entirely correct, for the reasons we have stated, and his judgment is affirmed, with costs.

Rogers *v.* Rogers.

(*Knoxville.* October 29, 1898.)

1. Taxation. *Purchaser at chancery sale not liable for taxes, when.*

Taxes that accrued between the date of the making of a chancery sale and the date of its confirmation must be paid, not by the purchaser, but out of the proceeds of the property sold; and this is true even though the purchaser's notes bear the former date. (*Post, pp. 429, 430.*)

Code construed: § 969 (S.); § 806 (M. & V.).

Cases cited: Shields *v.* Thompson, 4 Bax., 227; Childress *v.* Hunt, 2 Swan. 487; Armstrong *v.* McClure, 4 Heis., 80; Houston *v.* Aycock, 5 Sneed, 412; Ellis *v.* Foster, 7 Heis., 131.

2. Administration. *Real estate treated as personalty.*

An interest in real estate, bought by an administrator to save a debt due the estate, is to be treated as personalty, and not as real estate, in making distribution of the assets of the estate. (*Post, pp. 430–432.*)

Cases cited: Roberts *v.* Jackson, 3 Yer., 79; Johnson *v.* Patterson, 13 Lea, 626; Grimstead *v.* Huggins, 13 Lea, 728.

3. Same. *Method of stating account by Clerk.*

It is not necessary for the Clerk, in stating an administration account, to detail the items of cost charged against a distributee's share in an estate, when such costs were adjudged against the distributee in the same suit upon a prior appeal, and the items appear upon the proper books and dockets of the Court. (*Post, pp. 430–432.*)

FROM CLAIBORNE.

Appeal from Chancery Court of Claiborne County. Hugh G. Kyle, Ch.

JESSE L. ROGERS for John P. Rogers.

S. I. ROGERS for himself.

WILKES, J. This case is before us on appeal from decree of the Court of Chancery Appeals affirming the Chancellor's decree.

The first question presented under the assignment of errors is whether the vendor or purchaser under a sale made by the Chancery Court is liable for State and county taxes upon land, which taxes accrued after the sale but before the confirmation of the same.

The lands in controversy were decreed to be sold at April term, 1894. The sale was made August, 22, 1894. It was reported to the October term, 1894. The biddings were then opened, and left open until January 16, 1895, when the sale was confirmed. In the meantime the taxes for 1895 had accrued. The question presented is, who is liable for these taxes? The Chancellor held the vendor estate liable, and ordered the taxes paid out of the proceeds of sale, and not the purchaser, and the Court of Chancery Appeals affirmed this decree.

We think the law is clear that no title to land sold under decree of the Chancery Court vests in the purchaser until the sale is confirmed to him by the Court. He is not entitled to either possession or rents until after confirmation. And he is not liable for loss or injury by fire or otherwise which may happen to the property after it is sold and

before it is confirmed. *Childress* v. *Hunt*, 2 Swan, 487; *Shields* v. *Thompson*, 4 Bax., 227; *Armstrong* v. *McClure*, 4 Heis., 80. Nor does the confirmation have any retroactive effect so as to relate back to and vest title in the purchaser at the day of sale, even though the purchaser's notes bear that date. *Houston* v. *Aycock*, 5 Sneed, 412; *Armstrong* v. *McClure*, 4 Heis., 80; *Ellis* v. *Foster*, 7 Heis., 131.

The Chancellor and Court of Chancery Appeals are, therefore, correct in decreeing that these taxes be paid out of the proceeds of the land sold, as provided by statute, the day of sale being the day when the sale becomes complete and effective by confirmation. Shannon, § 969.

The second assignment is that certain items set out in the report of the Master are lumping charges. The Court of Chancery Appeals reports that the items are not lumping charges as a matter of fact, and, moreover, that no exception on this ground was made to the Master's report. This assignment is not good, therefore.

The third assignment is that it was error to treat an item of about $456 as part of the real estate, instead of the personal estate, appellant having, as he claims, a greater interest in the latter than in the former, and being, therefore, prejudiced by treating this fund as realty and not personalty.

The Court of Chancery Appeals report that no grounds were stated nor reasons given for this in-

sistence. It does report, however, that appellant's interest in the real estate was sold for about this amount and he failed to redeem it. It was bought in for the estate, and in this way swelled the real property of the estate to that extent, and in which appellant was entitled to share in the same proportion as the other heirs. In other words, the appellant owed the estate about $456, and, in order to save the debt, the estate bought in his interest of one-ninth in the real estate, and he failed to redeeem it. It thus occurred that $456 of the personal assets were invested in the real property of the estate. Treating it as thus changed into real property for the benefit of the estate, appellant's share would be only one-ninth of one-ninth, whereas, treating it as still personal assets, his interest would be one-ninth.

We are of opinion appellant's contention on this point is correct. It is true that the $456 debt due from appellant was bid on the land, but it was purely and solely to secure the debt, and it was not the purpose, nor would it have been within the province of the administrator, to change it into real assets, but only to resell the land and realize the amount bid upon it, and this amount would, when realized, be personal assets, and belong to the distributors and not to the heirs. *Roberts* v. *Jackson*, 3 Yer., 79; *Johnson* v. *Patterson*, 13 Lea, 626; *Grimstead* v. *Huggins*, 13 Lea, 728. Appellant is entitled to have this amount and the interest on it

treated as personal assets, instead of real property, and to share in it on that basis.

It is next insisted that it was error to charge appellant's share in the estate with $177.75 costs. The objection seems to be that these costs are charged in a lump. This is not correct, as found by the Court of Chancery Appeals, and is not improper in any event. These costs were adjudged against him in this same suit upon a prior appeal to this Court. The items appear on the proper books and dockets of the Court, and it was not necessary for the Clerk to detail the items. There was a certified statement of these costs, all properly made out, so that there was no error in this feature of the case.

This disposes of all the assignments which are properly before us and have any merit in them.

The decree of the Court of Chancery Appeals is so far modified as to treat the item of $456 and interest as part of the personal estate, and not as part of the real assets of the estate of D. F. Rogers, and, with this modification, it is affirmed, and the cause will be remanded for correction and such further orders as may be necessary. The costs of appeal will be divided, one-half paid by appellant and one-half by the estate.

McClurg *v.* McSpadden.

(*Knoxville.* November 2, 1898.)

Mortgages and Deeds of Trust. *Private sale pending proceedings to foreclose. valid, when.*

A judgment creditor who seeks to foreclose a mortgage of his debtor and subject the surplus to payment of his debt without impounding the property or obtaining receiver for it or injunction against its sale, cannot have relief upon a mere showing that the property was sold. pending the litigation. at private sale, as authorized by the deed of trust, where the sale is not made in violation of any agreement and no surplus is realized, and it is not shown that the sale is fraudulent or that the property was sacrificed or did not bring full value.

Case cited and approved: Porter *v.* Duke, 99 Tenn., 24.

Cited and distinguished: Epperson *v.* Robertson, 91 Tenn., 407; Fulghum *v.* Cotton, 6 Lea, 590; Schults *v.* Blackford, 9 Lea, 431.

FROM JEFFERSON.

Appeal from Chancery Court of Jefferson County. John P. Smith, Ch.

Noble Smithson for McClurg.

Washburn, Pickle, & Turner and Eugene Holtsinger for Manard.

Wilkes, J. On the 28th of July, 1896, Andes conveyed the real estate in controversy to Manard,

to secure a note for $267, due at six months. There was a power of sale at maturity, unless the note was paid. On the 20th of November, 1896, complainants filed this bill, attacking the conveyance as fraudulent and usurious. They claim to be judgment creditors with *nulla bona* returns, and by virtue of their bill they contend that they acquired a lien on the land, or Andes' interest therein, subordinate to the rights of Manard if the deed to him should be sustained. Manard answered the bill, admitted usury to the amount of $7.50, but denied all fraud. A few days before this answer was filed the complainants took from Andes and the McSpaddens a trust deed on certain real estate, to secure two judgments due them, being the same made the basis for relief in this case. This latter trust deed provided that, unless half of the two judgments and all costs of the Justice of the Peace and of this cause should be paid by the 15th of June, 1897, the trustee should sell the property. It also provided that this cause should stand continued until that time, and, if payment was made as provided, the cause should be dismissed, and, further, that, if the property was sold under the Manard mortgage, then that the complainants' should be foreclosed at the same time, and the surplus, after satisfying the Manard debt, should go to the McClurg debt. Manard was no party to this deed of trust, nor was he enjoined by the bill from selling under his trust deed, and, on March 20, 1897, he did sell under it, when

W. R. Turner bought the land at $288.96 and paid the purchase money. Thereupon complainants filed a supplemental bill, making Manard and Turner parties. It charged, among other things, that Manard agreed to postpone any sale under this trust deed until June 15, 1897, and on this account they had taken the second mortgage and given the time specified; that the sale was made in violation of this agreement and without notice to them until too late to stop the sale, and then refused to postpone, at their request and on their promise to pay the Manard debt. These charges, the Court of Chancery Appeals report, were all proven, except the one that Manard agreed to postpone, and this was disproven. It was also charged in the supplemental bill that Turner was not an innocent purchaser, but bought for Manard, but the Court of Chancery Appeals report that fact not proven. It also charged that the sale was not made in accordance with the power of sale in the trust deed; that the land sold for an inadequate price, but the Court of Chancery Appeals found these statements not proven, and that the entire proceeds were necessary to the satisfaction of the Manard debt and the expenses of the trust.

The contention was and is that, by filing the bill and bringing Manard before the Court, the complainants put the land in the custody of the law, and acquired a lien on it, and Manard thereafter, and pending the suit, could not make a valid sale.

This contention was not well taken. If the bill

had been sustained as one to set aside the conveyance to Manard, then a lien would probably have attached under the doctrine of *Epperson* v. *Robertson*, 7 Pickle, 407–412, and cases cited, but the Court of Chancery Appeals report that the charge of fraud is not sustained by the facts.

It is also true that a creditor who has execution and *nulla bona* return acquires a lien upon the defendant's equity in real estate by the filing of his bill, and in this case the complainants, if proof had been made of judgment and return of *nulla bona*, might have impounded the surplus. But in this case there is no surplus, if the sale is allowed to stand, so that the question whether Manard could proceed to execute his trust out of Court under the provisions of his trust deed, instead of under the orders of the Court, is the question at issue. This exact question is involved in the case of *Porter* v. *Duke*, 15 Pickle, 24, where it was held that a judgment creditor who seeks to foreclose a mortgage and subject the surplus without impounding the property, or obtaining receiver or injunction, cannot have relief upon a mere showing that the property was sold pending the litigation, at private sale, as authorized by the deed of trust, when no surplus is realized and it is not shown that the sale is fraudulent or that the property was sacrificed or did not bring full value.

This case does not in any wise conflict with the cases of *Fulghum* v. *Cotton*, 6 Lea, 590, and *Schults*

v. *Blackford*, 9 Lea, 431, as the effort in these cases was to force a sale, and not to prevent it. Moreover, in the present case it appears that complainants, for a valuable consideration, had bound themselves to delay until June 15, 1897. The defendant, not having agreed to such delay, cannot be postponed until that time. In addition, it is also agreed in the last trust deed that, if the property is sold under the Manard mortgage, it might also be sold under the trust deed. This was a clear concession that Manard might sell under his mortgage, and complainants, in that event, were to have the surplus. The fact that Manard was requested to postpone the sale, and that complainants offered, if he would do so, they would pay his debt, cannot matter, as no tender was made, and Manard was under no obligation to delay the sale or accept the promise.

The Court holds, therefore, that there is no error in the decree of the Court of Chancery Appeals, and it is affirmed.

HAMBY *v.* REID.

(*Knoxville.* November 2, 1898.)

1. STATUTE OF LIMITATIONS. *Six years.*

Although the statute of limitations of six years does not, in express terms, embrace sureties of a trustee or assignee, they are within its general terms and scope, and protected by it. (*Post*, *pp.* 439, 440.)

Code construed: § 4472 (S.); § 3472 (M. & V.); § 2775 (T. & S.).

2. SAME. *Begins to run, when.*

A beneficiary's cause of action for an account accrues against a trustee or assignee and his sureties when a sufficient time has elapsed for him, proceeding with due diligence, to have executed the trust according to its terms, and to have converted the assets into money and paid over and accounted for same, and from that date the statute of limitations begins to run in favor of the trustee and his sureties. (*Post*, *pp.* 440, 441.)

3. SAME. *Same. Case in judgment.*

The beneficiary's action against the sureties of a trustee is barred by the lapse of ten years from the date of the execution of a trust deed, where only the sale of a small stock of goods and the collection of a small amount of accounts was involved, and not much time required in the execution of the trust. (*Post*, *pp.* 440, 441.)

FROM CAMPBELL.

Appeal from Chancery Court of Campbell County.

H. B. LINDSAY, Ch.

J. E. JOHNSTON for Hamby.

JOUROLMON, WELCKER & HUDSON for Reid.

WILKES, J. This cause came to us by appeal of complainants from the decree of the Court of Chancery Appeals, affirming the decree of the Chancellor, and the main question presented is in regard to the right of the sureties of a trustee in a deed of trust to rely upon a statute of limitations in bar of a right to recover from them for their principal's default. Complainants insist that there is no limitation in such case, but that it is a case of express trust, not enforcible or cognizable in a court of law, and as to which there is no limitation by statute. The sureties insist that they are released by a statute of six years (Shannon, § 4472), which protects the sureties of guardians, executors, administrators, Sheriffs, Clerks, and other public officers for nonfeasance, misfeasance, and malfeasance in office, and applies to actions on contracts not otherwise expressly provided for. The argument is not that trustees, or the sureties of trustees, are expressly named in the Act, but that it contemplates the sureties of all officers, whether public or private, and though they may be classed as trustees executing express trusts, and that this idea is reinforced by the provision for "actions on all contracts not otherwise expressly provided for within six years after the cause of action accrued."

The Chancellor and Court of Chancery Appeals took this view of the matter, and held that the

sureties of trustees and assignees under mortgages and deeds of trust were contemplated and embraced by the statute, and in this view we concur. While sureties of trustees are not expressly named in the statute, we think that they are embraced within its general provision, "for actions on all contracts not otherwise expressly provided for." It is said trustees ought not to be held to be included, inasmuch as they execute an express trust. But this is so also as to guardians, administrators, and other express trustees, and the construction in this case makes a harmonious holding in all such cases.

A practical difficulty arises in applying the law. Granting that the statute protects the sureties of a trustee, it does so only after the expiration of six years after the cause of action accrued. The question is, when does the cause of action accrue? The Court of Chancery Appeals hold that it was the duty of an assignee or trustee to proceed with all reasonable diligence to execute his trust according to its terms, convert the assets into money, and pay over and account for the same, and that the right of the beneficiary is to proceed against him after such reasonable time has elapsed.

In this case the trust was made in 1885, and the bond was then given, but the trust was only partially executed. Some of the assets were not collected, and some of the collections not paid out, and no report or settlement was made. The bill was filed in July, 1895, or after a lapse of ten

years, and, inasmuch as the trust was only to sell a small stock of goods and collect a small amount of accounts, that no great time was required, and that, under these facts, the statute had run. We are content with this view and holding of that Court, and affirm their decree in this feature of the case.

Another error is assigned, as to the confirmation of a report filed in the Court below by the Clerk and Master, but we think that the Court of Chancery Appeals has disposed of this properly, and so as to reach the equities of the case.

The decree of the Court of Chancery Appeals is affirmed.

JONES *v.* TELEGRAPH CO.

(*Knoxville.* November 2, 1898.)

1. TELEGRAPH COMPANY. *Degree of care required of.*

The diligence which an ordinarily prudent and diligent man would exercise in the discharge of his own business, under like circumstances, is not the measure of the duty of a telegraph company in respect to the delivery of a telegram, but considerations of public policy demand that such company shall be held responsible for a very high degree of care. (*Post, p. 443.*)

Cases cited and approved: Marr *v.* Telegraph Co., 85 Tenn., 538; Telegraph Co. *v.* Mellon, 96 Tenn., 68.

2. SUPREME COURT. *Renders final judgment on reversal, when.*

This Court, upon reversing a judgment for defendant, on account of error in the charge, in an action for damages for negligent delay in the delivery of a telegram, will not remand the cause, although the trial was before a jury, but will direct that a judgment be entered for plaintiff for a nominal amount and costs, when it is clear that defendant is liable for some damages, and that the recovery must be nominal. (*Post, pp. 443, 444.*)

FROM ROANE.

Appeal in error from Circuit Court of Roane County. JOHN J. BLAIR, J.

H. P. STEPHENS for Jones.

OTTO FISCHER for Telegraph Co.

CALDWELL, J. Thomas Jones brought this action to recover damages from the Western Union Telegraph Co. for its alleged negligent delay in the delivery of a telegram sent to him. Verdict and judgment for the defendant, and the plaintiff appealed in error.

The trial Judge erroneously instructed the jury that the defendant was under legal obligations to exercise only such diligence in the delivery of a telegram "as an ordinary, prudent, and diligent man would exercise in the discharge of his own business under like circumstances." Telegraph companies are, in a large sense, public corporations, endowed with many rights and privileges that individuals do not possess and cannot enjoy. They are allowed the functions of eminent domain and are protected by the public laws in a *quasi* public occupation. Their obligations in respect of their business are, therefore, more exacting than those of a private individual. "Considerations of public policy demand that they shall be held responsible for a very high degree of diligence." *Marr* v. *Western Union Telegraph Co.*, 85 Tenn., 538; *Telegraph Co.* v. *Mellon*, 96 Tenn., 68, 69.

For this error in the charge of the Court, the judgment is reversed.

After reversal shall the case be remanded for a new trial, or shall it be finally decided by this Court? Ordinarily, the former course would be pursued, the trial below having been before a jury, and not by

the Court without a jury. This is an exceptional case, however, and calls for an exception to the ordinary rule.

The testimony of defendant shows conclusively that it breached its contract, in that it did not exercise that degree of diligence devolved upon it by the law. By that breach the defendant inevitably becomes liable for some damages. The testimony for the plaintiff discloses, with equal certainty, that he sustained only nominal damages. Then the defendant is liable for nominal damages; no more, no less. This being so, nothing could be accomplished to the advantage of either party by a remand and new trial. The plaintiff, in no event, can be entitled to more than nominal damages; the defendant, in any event, is liable for that much. No other result, in whatever Court, would meet the demands of the law upon the conceded facts of the case; and if a different result were reached in the lower Court upon a remand and new trial, this Court, upon another appeal in error, would be compelled to reverse again.

Such being true, this Court directs that a judgment be now entered here in favor of the plaintiff, and against the defendant, for one dollar and all costs.

BANK *v.* PENLAND.

(*Knoxville.* November 2, 1898.)

1. BANKS AND BANKING. *Notice to cashier is notice to bank, when.*

Notice to the cashier of a bank of equities between the maker and indorser of a note, is chargeable to the bank where he was allowed full liberty and the widest authority to discount paper, and the board of directors and discount committee rarely met, and did not look after the discounts as was their duty. (*Post, pp. 446, 447.*)

2. BILLS AND NOTES. *Innocent holder.*

The mere fact that the purchaser of a negotiable note knew that the same was given for land, and that there was a lien on the land for the unpaid purchase money, and that there might thereafter occur a partial failure of consideration by an enforcement of the lien, does not deprive him of the character of a *bona fide* holder or subject him to the equities between the original parties. (*Post, pp. 447–449.*)

Cases cited and approved: Bank *v.* Stockell, 92 Tenn., 256; Bearden *v.* Moses, 7 Lea, 459.

Cited and distinguished: Ingram *v.* Morgan, 4 Hum., 65; Ferris *v.* Tavel, 87 Tenn., 386.

FROM COCKE.

Appeal from Chancery Court of Cocke County. JOHN P. SMITH, Ch.

H. N. CATE for Bank.

W. J. MCSWEEN for Penland.

WILKES, J. This is an action to recover against defendant Penland two notes for $66.66 each. The notes were given by Penland to the Newport Development Co., and by it indorsed, and complainant claims to be an innocent holder for value of the same. Penland answered the bill, and filed a cross bill, in which he seeks to avoid the notes and rescind the contract out of which they arose, upon the ground that they were obtained by the fraudulent representations of the bank and development company that the lot for which they were given was free of all incumbrances and liens; that the bank had notice of the liens held by the parties who sold to the development company, and took the notes subject to the equities of Penland against the development company. The Court of Chancery Appeals find that the bank had notice of the lien of the Newport Real Estate Co. upon this lot, and was affected, in consequence, with all of Penland's equities against that part of the lot purchased from that company, but that a portion of the lot was purchased from one Denton, and the bank did not have such notice of a lien in favor of Denton as would affect it. Hence that Court canceled one note, and entered a credit on the other, and gave judgment against Penland for the balance, the idea being to release Penland from liability for so much of the lot as was bought from the Newport company, but hold him for so much as was bought from Denton by the development company. Both parties have

appealed, and in this Court it is insisted, for complainant, that Penland should be held for the whole of both notes, and by the defendant that he should be released from both.

Disposing of complainant's assignments, first, it is insisted that the Court of Chancery Appeals erred in holding that notice to the cashier of complainant bank was notice to the bank, and the contention is, that the bank would only be affected by notice to one of its discount committee or directors. The Court of Chancery Appeals finds, as a fact, that the cashier of this bank was allowed full liberty and the widest authority to make loans and discount paper, and that the discount committee and board of directors rarely met, and did not look after the discounts, as was their duty. Having given full authority to the cashier to make discounts, the bank cannot be heard to say that notice to him was not notice to the bank in the discounting of notes.

The next assignment is, that Penland knew of the defects in his title, and took warranty deed to protect himself therefrom, and hence, it is no defense to him that the bank had notice of these defects and liens. Nor can it avail him anything that the development company afterwards became insolvent. In the same connection it is said that Penland, having taken a deed with covenants of warranty, has no equitable defense against the note unless he shows fraud; but his only protection is the covenants in his deed. The Court of Chancery Appeals find that,

while fraud is charged in the cross bill, it is not shown in the proof. That Court reports, also, that the fact of the insolvency of the development company is set up in the answer, and that the cross bill, in effect, charges that Penland has been evicted, and these facts are proven, but they are not alleged to have been in existence when the note was received by the bank. Upon this statement of facts, the question recurs, Is the bank a *bona fide* holder and innocent purchaser of the notes, or is it affected by the equities between the original parties? It took the notes before maturity, as collateral, it is true, but as security for money then advanced. If there were nothing else in the case this would make it an innocent holder. *Bank* v. *Stockell*, 8 Pickle, 256. Does the mere fact that it knew the notes were given for land, and that there was a lien on the land for unpaid purchase money, and that there might thereafter occur a partial failure of consideration by an enforcement of the lien, render the bank subject to all equities that might thereafter arise between the original parties? The Court of Chancery Appeals was of opinion it did, and they cite *Ingram* v. *Morgan*, 4 Hum., 65, and *Ferris* v. *Tavel*, 3 Pickle, 386, in support of their holding. But in both of these cases the holder of the notes in controversy took them to secure a pre-existing debt, and could not be called an innocent holder. And the cases referred to in 4 Am. & Eng. Enc. L. (2d Ed.), p. 198, are based upon a similar state of facts.

But this partial failure of consideration cannot be asserted against a *bona fide* holder for value, for such a holder takes the title free from the equities between the original parties. 4 Am. & Eng. Enc. L. (2d Ed.), p. 198; *Bank* v. *Stockell*, 8 Pickle, 256.

In addition, it does not appear that these equities existed between the original parties at the time these notes were indorsed to the bank. The purchaser, Penland, had not then been evicted, and, so far as the record shows, the insolvency of the company had not then been made manifest. The defense, in order to be set up against the indorsee, must be an equity that existed when the indorsement was made. *Bearden* v. *Moses*, 7 Lea, 459.

We are of opinion that upon the facts as found by the Court of Chancery Appeals, the bank was the *bona fide* innocent holder of these notes, and entitled to enforce their collection free of any equities arising between the original parties after it received them, and the Court should have so decreed.

The decree of the Court of Chancery Appeals is reversed, and judgment will be entered in favor of complainant against defendant for both notes and interest and ten per cent. attorneys' fees, as provided in the notes, and all costs.

Forshee *v.* Willis.

(*Knoxville.* November 2, 1898.)

1. General Assignment. *Description of property.*

An assignment for creditors, under Act of 1881, must contain such a description of the assigned property as will enable the assignee to take possession, and, if he has possession delivered, it must be so definite as to description and location that the creditors, as well as the assignee, may know when it has all been taken charge of. (*Post, pp. 452, 453.*)

Case cited: Scheibler *v.* Mundinger, 86 Tenn., 674.

2. Same. *Same.*

The necessity of describing, locating, and identifying property in an assignment for creditors, under Act of 1881, is not obviated by a statement that the property is or has been delivered to the assignee. (*Post, pp. 452, 453.*)

FROM JEFFERSON.

Appeal from Chancery Court of Jefferson County. John P. Smith, Ch.

Park, King & Park for Forshee.

C. T. Rankin for Willis.

Wilkes, J. The controlling question in this cause is the validity or invalidity of a general assignment

under the Act of 1881, as against an attaching creditor. The Court of Chancery Appeals reversed the Chancellor, and held the assignment invalid and void, and that complainant is entitled to satisfaction of her debt out of the property conveyed. The Court of Chancery Appeals held that there was nothing, either in the conveyance or schedule, that in any manner indicated where the greater part of the property was to be found, nor that gives any means or mode of identifying it. The conveyance describes the property as: "All the grantor's stock in and at the Forshee tannery, in the town of Mossy Creek, and property elsewhere, together with all his notes and accounts of every description whatever, and hereby delivers the same to the Master, whereof a full and complete inventory or schedule is hereto annexed, marked 'A,' and made part hereof. The said schedule contains all the property of every kind and description owned by me (the grantor), and I hereby deliver the same into the possession of the Master." Schedule "A" describes the property thus: "My entire stock or lot of goods or property, consisting of about 125 cuds of tanbark, about 50 bushels of corn, a one-horse wagon and horse, 2 plows, 3 head of hogs, about 25 gallons of oil, about 200 pounds of tallow, about 150 bushels of lime; entire stock of hardware, consisting of buckles, reins, bits, tacks, 1 saddle; entire stock of hides, about 40 or 50; one lot of horse collars, one lot of whips, one lot of halters." Schedule "B" is a

list of accounts, embracing some thirty-five in number, of which the following is a sample: "Mitchell, $2.10; W. M., $4.20; Tate, $1.15."

Now, from this conveyance and schedule, it might perhaps be inferred that some of the property specified in schedule "A" would be found at the tannery—that is, such as would make up part of a tannery stock—though it is not so stated expressly. But that all the property was not there is apparent from the conveyance itself, which refers to the stock at the tannery, and adds, "and property elsewhere." Where the corn, wagon and horse, plows, and hogs are to be found is not stated nor indicated, nor is there any definite description, such as would serve to identify them, given to enable the assignee or others to locate them.

We think this objection is fatal to the assignment. There must be such a description as will enable the assignee to take possession, and, if he really has possession delivered, it must be so definite as to description and location as that creditors, as well as the assignee, may know when it has all been taken charge of. We think the case falls fairly under the rule in *Scheibler* v. *Mundinger*, 2 Pickle, 674. It cannot suffice to do away with a sufficient description, location, and identification, to say that the property is or has been delivered to the assignee. If this were so, then the schedule would not be at all necessary, but the debtor could simply say, "all his property, all of which he had delivered to the

assignee." Certainly this rule cannot be held good.

We are of opinion there is no error in the decree of the Court of Chancery Appeals, and it is affirmed.

We may add that schedule "B" is also wholly insufficient in its description of the accounts and persons owing them.

It is said the Court of Chancery Appeals, after holding the conveyance void, should have given the debtor such property as is exempt to mechanics. This exception and claim is made for the first time in this Court, and cannot be available now.

FORD *v.* STATE.

(*Knoxville.* November 2, 1898.)

1. ALIBI. *Erroneous charge as to.*

It is error for the Court to charge that defendant's failure to prove his defense of alibi is a circumstance against him, though not conclusive of his guilt. Such failure is not a circumstance against defendant where the evidence of alibi, though not conclusive, bears no special indication of being manufactured or fraudulent. (*Post, p. 456.*)

2. SAME. *Same.*

It is error for the Court to charge that proof of alibi is of no value whatever, unless it covers the entire time of the transaction in question, and renders it impossible for defendant to have been at both places, since such proof may be of some value, although it does exclude the possibility of presence at the time and place of the offense. (*Post, pp. 456, 457.*)

Case cited: 84 Ill., 565.

3. CHARGE OF COURT. *As to identity.*

The Court should charge, without request, upon the question of identity raised by the evidence in a criminal case, where the sentence imposed is practically equivalent to a life sentence. (*Post, p. 457.*)

4. SAME. *Error as to jury being judges of the law.*

A charge of the Court, that "the Court is the judge of the law, but the jury are the judges of the applicability of the law, as given them in charge, to the facts of the case," is erroneous in a criminal case where the law, in some other respects, was not accurately or sufficiently charged, and the Court can see that defendant may have been prejudiced thereby. (*Post, pp. 457–465.*)

Constitution construed: Art. I., Sec. 19.

Cases cited: Hannah *v.* State, 11 Lea, 201; Harris *v.* State, 7 Lea, 538; McGowan *v.* State, 9 Yer., 185; Dale *v.* State, 10 Yer., 550; Nelson *v.* State, 2 Swan, 481; Robertson *v.* State, 4 Lea, 425; Butler *v.* State, 7 Bax., 35.

5. SAME. *Correct as to jury being judges of the law.*

The Court approves as correct a charge in these words, to wit: "The jury are the judges of the facts and the law as it applies to the facts. In making up their verdict they are to consider the law in connection with the facts, but the Court is the proper source from which they are to get the law. In other words, they are judges of the law, as well as the facts, under direction of the Court." (*Post, pp. 461, 462.*)

Cases cited and approved: Harris *v.* State, 7 Lea, 538; Dale *v.* State, 10 Yer., 550; Hannum *v.* State, 90 Tenn., 648.

Cited and overruled: Withers *v.* State, 3 Leg. Rep., 106; Deman *v.* State, 3 Leg. Rep., 184.

6. SAME. *Same.*

The jury in a criminal case should not, under the Constitution, set up their own supposed knowledge of the law against that of the Court, whether they assume to have that knowledge of their own or to have acquired it from counsel in argument; but where there is no direction by the Court, or not a full direction, on points involved, they should not be limited to only such law as is given them by the Court, if there be yet other laws applicable to the case not contradictory to that thus given, which they may understand from the argument or know themselves. (*Post, pp. 457–460.*)

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. FLOYD ESTILL, J.

JOHN O. BENSON for Ford.

Attorney-general PICKLE for State.

SNODGRASS, C. J. Indictment and conviction of rape, and sentence to twenty-one years in the pen-

itentiary. Appeal by defendant. The guilt of defendant depended on proof of his identity. The evidence on that subject was that of the little negro girl, upon whom the offense was alleged to have been committed by the negro Ford, plaintiff in error. There was no other evidence implicating him. She could not see him (the offense, if committed, being committed in the dark), but testified to his identity because of "the way he felt and changed his voice." The defendant testified that he was not guilty; was not, in fact, there, and offered other evidence of an alibi. The evidence of an alibi was not conclusive, but it bears no special indication of being manufactured, fraudulent, or fabricated. In this condition of the record the Court charged, among other things: "Where a defendant interposes the defense of an alibi, and fails to establish it, it is a circumstance against him, but is not conlcusive evidence of his guilt." This is error. It is not always a circumstance against a person charged with an offense that he merely fails to establish an alibi which he attempts to prove. 2 Am. & Eng. Enc. L. (new ed.), p. 59. The jury may look to it or not, according to the surroundings. 15 Lea, 694–696. A perfectly innocent man might make such an attempt in good faith, and fail, for lack of evidence, to establish it. It could only be a circumstance against him if it appeared to have been made in bad faith, manufactured, fabricated, or false. The Court further said: "Proof of an alibi should cover the

whole time of the transaction in question, for if it be possible that the prisoner could have been at both places, the proof of the alibi is of no value whatever." This is too strong. It need not exclude the absolute possibility of presence at the time and place of the offense, to be of some value. It can be admitted and considered for what it may be worth, if it renders it very improbable that defendant could have been present. This is the sound rule. 2 Am. & Eng. Enc. L. (new ed.), pp. 57, 58 and notes. See, specially, *Creed* v. *The People*, 81 Ill., 565. It can only be conclusive when, taken as true, it shows that there was no possibility of defendant's presence, where that is necessary. *Id.* The Court wholly omitted to give any special charge on the question of identity. There was no request, but the sentence is practically equivalent to a life sentence, and as it was the question in the case we think it should have been given.

The Court charged: "The jury are the exclusive judges of the testimony, and the credibility of the witnesses. The Court is the judge of the law, but the jury are the judges of the applicability of the law, as given them in charge, to the facts of the case." This is error. Const., Art I., Sec. 19.

We have nowhere gone so far as to say that in criminal cases the Court is the judge of the law. The constitutional declaration that the jury shall have the right to determine the law and facts, under the direction of the Court, in libel, as in other criminal

cases, has been uniformly held to make the Court not the judge of the law. Nor are the juries as broadly judges of the "applicability of the law" as is implied. If so, the Court could judge alone of the law applicable to a particular case, and give it to them, and they might determine it was not applicable at all. This would fritter away the constitutional provision and make it mean precisely what it does not. It is the duty of the Court to direct the jury what the law is, and it is the duty of the jury to apply it, under the direction of the Court, so far as he has directed, to the facts in evidence. They must treat it as applicable to the facts, and apply it as they determine the facts to be. The Court is a witness to them what the law is, and the jury should adjudge it to be as given them, but, if the jury adjudges what is given in charge to be law, they cannot adjudge it to be inapplicable. The Judge may not charge all the law. So far as he does charge anything to be law, or not to be, the jury should take his statements as law, but, at last, they have the right to judge of what is or is not law. They cannot properly disregard his instruction, and should take the law, as far as given by the Court, as the law of the case, and not assume to set up any knowledge of their own as against his. But it is true that in many cases the Court does not, and cannot in any reasonable limit, give all the law which is applicable to all the facts and phases of every criminal case, and the defendant

is in some way entitled to it. He may get the benefit of it by request, but that is not the only way, even if it were always practicable. Under our practice his counsel have the right to read and argue the law of his case to the jury. *Hannah* v. *State*, 11 Lea, 201. We can see no practical good that could result to him from this if the jury might not respond to it by considering and giving him the advantage of it. Of course we are not to be understood as meaning that, when the Court gives them the law on a particular proposition, they should not follow it. On the contrary, we think the law to be correctly settled that they should not set up their own supposed knowledge of the law against that of the Court, whether they assumed to have that knowledge of their own or to have acquired it from counsel in argument; but, where there is no direction by the Court, or not a full direction in points involved, they should not be limited to an application of only such law as is given them by the Court, if there be yet other, and not contradictory to that thus given, which they may understand from the argument or know for themselves.

On the general subject whether, and to what extent, the jury are the judges of the law, there has been in this State, as in others, much controversy and some confusion of decisions. For many years there was no question raised against the view that the jury were the exclusive judges of the law, under the direction of the Court, as of the facts

which he permitted to be proven. In an early day it was decided that a qualification of it as follows was made too strongly: "The Court was to be the judge of the law, and it is the duty of the jury to receive it as laid down and expounded by the Court, and that the jury were not the exclusive judges of the law." *McGowan* v. *State*, 9 Yer., 185–194. Following this, a charge of the Circuit Judge, that "the jury are the judges of the law as it applies to the facts. They are the exclusive judges of the facts, but, in making up their verdict, they are to consider the law in connection with the facts, but the Court is the proper source from which they are to get the law. In other words, they are the judges of the law, as well as the facts, under the direction of the Court," was held to be substantially correct. *Dale* v. *State*, 10 Yer., 550. Afterwards a charge was so held, and as containing no error of which a defendant could complain, couched in the following words: "The jury are not only the judges of the facts in the case, but they are the judges of the law. The Court is a witness to them of what the law is. After the Court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the Court." *Nelson* v. *State*, 2 Swan, 481. Yet, later, the Court said it was not error to charge that the jury could not arbitrarily disregard the instructions given them as to the law. *Robertson* v. *State*, 4 Lea, 425.

In some of these cases it was said the jury could determine the law differently from the Court, and it was said they should not do so. The power was conceded to be given them; the right to do so was practically denied. It serves no purpose to discuss these cases, or to attempt to harmonize them, or to harmonize the result of these views with the condition to which it brought the question between power and right. They make their own explanation, so far as any is to be made.

Thus stood the law (in some confusion, it must be admitted,) until 1881, when it again came before the Court, when, after much discussion of the subject, in which it was practically adjudged that juries are judges of the law "only under the direction of the Court," and have no right to disregard the law as given to them by the Court, are to receive the law from the Court, and are to judge the law as it applies to the facts, the Court held a charge of the Circuit Judge to be erroneous, in which he said: "The jury are the judges of the law. Should you conclude that the Court has not given you the law correctly, and should you conclude you know the law is otherwise than is given you by the Court, then you may pass upon the case as you know it." This Court then proceeded to lay down the correct rule, and, in that connection, indicated a proper form of charge therefrom deduced, as follows: A proper charge is, "The jury are the judges of the facts and the law as it applies to

the facts. In making up their verdict they are to consider the law in connection with the facts, but the Court is the proper source from which they are to get the law. In other words, they are judges of the law, as well as the facts, under the direction of the Court." *Harris* v. *State*, 7 Lea, 538. This was the charge, in its exact language, held to be substantially correct in *Dale* v. *State*, 10 Yer., 550.

It is observable that the Court says they are judges of the law "as it applies to the facts," not judges of the "applicability of the law" given them in charge, which is not by any means precisely of the same meaning, though elsewhere in the same opinion the Judge delivering it so uses them. "As it applies to the facts," merely means that the jury are to apply it to the facts they find. "To judge of the applicability" of the law would include the power, not only to judge and apply, but to judge whether or not it applied at all to the case, and would involve the right to disregard the whole charge as inapplicable. This was not intended. They are to decide the facts, and apply the law to this or that state of facts, as they may determine the result of the evidence establishing the facts they find.

In this case the Court assumes that "there had been opinions and dicta not in accord with the rule here laid down," and cites one case in accord—MS., Jackson (opinion by Judge Turney). Of these opinions and dicta, the Court says "they are over-

ruled." How many of them there were it is impossible to say. There were at least two then enrolled and published in the Legal Reporter—*Withers* v. *State*, 3 Leg. Rep., 106; *Derman* v. *State*, 3 Leg. Rep., 184. The first of these cases was a misdemeanor case. The Judge charged the jury: "You are the judges of the facts, but you are not the judges of the law. You must receive the law as charged to you by the Court, and find your verdict in accordance with the law so given. The rule is different in felony and misdemeanor cases. In the former you are judges of both the law and the facts, but in the latter of the facts only." This was held to be reversible error. The rule was the same, and was incorrectly given.

The opinion in this case was by Judge Turney. Judge Freeman, who subsequently delivered the opinion in the 7 Lea case, dissented, and vigorously combated the correctness of the rule in felony cases, and bitterly fought its extension. The second case approved the first, and again reiterated that it was reversible error to charge that juries must receive the law as given by the Court. These cases must, therefore, be considered as overruled, so far as they held, unqualifiedly, that juries are judges of the law, but not, of course, in extending or applying whatever rule exists in felony cases to misdemeanor cases. We note one other case, in which the Court held "that it does not constitute reversible error for the Court to charge that juries were judges of the law

as well as the evidence, and had the legal right to disregard the instructions of the Court." It is so correctly digested by the reporter. *Hannum* v. *State*, 6 Pick., 648. In so deciding, the language of Judge Lea was broader than the point involved. He said: "The charge is confessedly incorrect. The jury are not judges of the law, but must take the law as charged by the Court in criminal as well as civil cases." The Judge delivering this opinion was the reporter who wrote the headnotes for the 7 Lea case, in which it was stated that juries are not judges of the law, and he cites this case as authority. But we have already seen this case went to no such extent. It was too strongly digested in this respect in the headnote, and the error was repeated in the dictum of the 6 Pickle case, which escaped the observation of the Court.

What was, in fact, decided in the Hannum case, we have shown by quotation of the charge held erroneous, but not to contain reversible error, because it did not appear to have been, or that it might have been, injurious to defendant, repeating on this point also the holding in the 7 Lea case. It will thus be seen that we have no case going so far as to say, in the face of the constitutional provision, that juries are not judges of the law (in some form), however vague it may have been made as a rule in fact, and this Court will go no further. No other case changes or extends the rule laid down in the Harris case. It remains the law. But we

have seen that in the Hannum case and in the Harris case it was held that such an error is not reversible, it not appearing that defendant might have been prejudiced thereby. It was also so held in McGowan's case. The contrary holding in Wither's and Derman's cases has been overruled, as we have seen. It has also been held that mere failure to tell the jury that they are judges of the law is not necessarily reversible error. It is worth noting here that Judge Nicholson, who delivered the opinion, regarded it as so well settled that they were so under the Constitution, that he said they would be presumed to know it. *Butler* v. *State*, 7 Bax., 35. The law, therefore, remains that where no injury could have resulted to defendant, it is not reversible error. Such a case is one where, whoever judged of the law, it was sufficiently and accurately charged, and as fully as should have been. We have seen in this case that the law was not accurately charged in one respect, and not sufficiently and fully charged in others. It follows, therefore, that the charge in this respect may have been prejudicial to defendant. It so appears to the Court, and hence also constitutes reversible error.

The judgment is therefore reversed, and the case remanded for a new trial.

NANCE *v.* CHESNEY.

(*Knoxville.* November 4, 1898.)

1. SUPREME COURT. *Will not consider excluded evidence in chancery cause.*

Excluded evidence in a chancery cause cannot be looked to on appeal, where it was not made part of the record by bill of exceptions, nor set out in the minutes signed by the Chancellor, although the decree contains a brief general reference thereto, and to the rulings thereon.

Cases cited: Anderson *v.* Railroad, 91 Tenn., 54; Weakley *v.* Pearce, 5 Heis., 415; Steele *v.* Frierson, 85 Tenn., 438; Wynne *v.* Edwards, 7 Hum., 418; Kelley *v.* Fletcher, 94 Tenn., 5; Perry *v.* Pearson, 1. Hum., 431; Spurlock *v.* Fulks, 1 Swan, 291; Aymett *v.* Butler, 8 Lea, 453; Jones *v.* Stockton, 6 Lea, 133.

FROM UNION.

Appeal from Chancery Court of Union County.

H. B. LINDSAY, Ch.

SAMUEL J. AILOR and SHIELDS & MOUNTCASTLE for Nance.

D. D. ANDERSON for Chesney.

MCALISTER, J. Complainants, as executors of John Nance, deceased, filed this bill to collect certain notes for purchase money of land, which were

executed by the defendant, Gordon Chesney, to his co-defendant, William Kelley, and by the latter assigned to complainants' testator, John Nance. The facts, as found by the Court of Chancery Appeals, are substantially, viz.: On the 24th November, 1888, said William Kelley conveyed by deed the tract of land in controversy to Susan Chesney and Gordon Chesney, to each an undivided one-half interest, for the consideration of $1,500, $900 of which was paid, in full of the consideration due for the undivided interest conveyed to Susan Chesney, and for the balance of purchase money, to wit, $600, Gordon Chesney executed his four notes, for $120 each, maturing in one, two, three, and four years from date. A lien was retained on the face of the deed to secure these notes on one-half of the land, which is not to include the dwelling on the land, as recited in the deed. A lien was also retained on the face of the notes. On the 24th April, 1889, William Kelley assigned and transferred these notes to John Nance, complainants' testator, and guaranteed payment of same, waiving demand and notice. S. N. Kelley, son of William Kelley, also signed the assignment and guaranty of these notes. Credits amounting to $87 are entered on the notes, and this bill is filed to collect the balance and to subject the land as security. Susan Chesney was also made a party defendant, with a view of partitioning the land.

Defendant, Gordon Chesney, answered the bill,

and averred that John Nance, after the transfer of the notes to him, made S. N. Kelley, son of William Kelley, the former's agent, and authorized him to collect the notes, and that defendant, Gordon Chesney, with the knowledge, authority, and consent of John Nance, had made various payments to Kelley, which had not been credited on these notes, and that the notes had thereby been paid and satisfied.

The Chancellor pronounced a decree in favor of the complainants, and against Gordon Chesney and William Kelley, for the sum of $791.66, balance due of principal and interest on said notes, after crediting them with amounts indorsed on first notes. This amount was decreed a lien on Gordon Chesney's one-half interest in the land, and the same was ordered to be sold for the satisfaction of said decree.

The Court of Chancery Appeals, in its opinion, finds that certain evidence was excluded by the Chancellor, which tended to show further payments by Chesney on these notes, and the question presented was, whether this excluded evidence was properly preserved by bill of exceptions, or otherwise, so that the action of the Chancellor in excluding it might be reviewed.

The decree of the Chancellor recites that, on the trial of this cause, complainants excepted to that part of the testimony of defendants, Gordon Chesney and William Kelley, which related to or purported to detail any transaction with, or statement by John Nance, deceased. They (complainants) also

objected to that part of the testimony which purported to give any contract with or statement by S. N. Kelley, or any payments to said Kelley, because such evidence was mere hearsay, being had in the absence of John Nance, etc. Further, if Kelley was agent of John Nance, deceased, as insisted by defendant, Gordon Chesney, then Chesney could not testify as to any conversation or transaction with, or statements by, S. N. Kelley. These exceptions were sustained by the Court.

Complainants also objected to that part of the testimony of James M. Sharp, James A. Dyer, W. E. Collett, Linville Damewood, and W. R. Kelley purporting to detail statements of John Nance, deceased, in regard to notes which said Nance held against each of them, as being irrelevant and immaterial to the issues in this case. Complainants also objected to that portion of the evidence detailed by these witnesses and Susan Chesney and William Kelley in regard to the payments made to S. N. Kelley, or any contract Chesney had with Kelley to the effect that he was to pay the notes with farm products, on the ground that the evidence was wholly irrelevant and immaterial to these issues, and because, if made at all, were made in the absence of John Nance, and, further, because the notes sued on in this case were transferred to John Nance before due, and, if Chesney made any payments to Kelley, he did so at his peril; and the decree re-

cites, "all of which objections were sustained by the Court."

The Court of Chancery Appeals, without determining the competency and relevancy of the testimony excluded by the Chancellor, adjudged that it could not be considered on appeal, for the reason it had not been preserved and made a part of the record by bill of exceptions. This ruling was in accord with the settled practice of this Court. When evidence offered in a chancery cause is excluded upon objection, the correctness of the ruling cannot be challenged on appeal unless the excluded evidence be made a part of the record by bill of exceptions. *Anderson* v. *Railroad*, 91 Tenn., 54; *Steele* v. *Frierson*, 85 Tenn., 438; *Kelley* v. *Fletcher*, 94 Tenn., 5; 1 Hum., 431; 1 Swan, 291; 8 Lea, 453. The Court of Chancery Appeals therefore held that, in the absence of portions of the excluded evidence, there would not be sufficient evidence to justify it in finding in favor of the defendant, Chesney, for the credits claimed by him.

It is true that if the excluded evidence had been spread upon the minutes, with the exceptions and the action of the Court thereon, this would have served the place of a bill of exceptions, for the signature of the Chancellor to the minutes would have been an authentication of the action of the Court, and the evidence excluded would in this way have been precisely identified. In *Wynne* v. *Edwards*, 7 Hum., this Court, while announcing the general

rule that extraneous matter, to be available in this Court, must be made a part of the record by bill of exceptions, held it would be sufficient if it were spread upon the minutes, since the minutes must necessarily be signed by the Judge. So in *Weakley* v. *Pearce*, 5 Heis., 415, it was held an entry upon the minutes ordering a change of venue was a sufficient bill of exceptions, citing *Wynne* v. *Edwards*, *supra;* 6 Lea, 133.

In *Jones* v. *Stockton* the same rule is recognized. "The reason," says Judge Cooper, "is that the Judge thereby authenticates the fact or the paper precisely as if it had been embodied in a bill of exceptions signed by him. But," continues the Judge, "a mere reference to a document in an entry signed by the Judge is not sufficient."

It will be observed in the present case the excluded evidence is not set out in the decree, and it is only referred to in general terms. For instance, the decree recites that complainants objected to that part of the testimony which purported to give any contract with or statements by S. N. Kelley, or any payments to S. N. Kelley, upon the ground that, if Kelley was the agent of Nance, the testimony of these parties was incompetent, John Nance being deceased.

If this Court should hold that payments made to the agent of deceased could be proved by defendant, Chesney, in a suit against him by the executor of John Nance, deceased, the decree does not show the

amount of said payments, or that they were made on the particular notes in the suit. Again, if we should hold that Gordon Chesney is a competent witness to prove contracts with and statements made by S. N. Kelley, agent of John Nance, deceased, the particular contracts and statements are not set out in the decree.

It results that the decree was correct, and is affirmed.

SINARD *v.* RAILROAD.

(*Knoxville.* October 5, 1898.)

RAILROADS. *Not liable for loss of mare falling into cut.*

Neither at common law nor under the Act of 1891, requiring the fencing of railroad tracks, is a railroad company liable for the loss of a mare that, on account of her blindness, was killed by falling into an unfenced cut through the owner's pasture field, made in the original construction of the road thirty years before.

Acts construed: Acts 1891, Ch. 101.

Cases cited: Railroads *v.* Crider, 91 Tenn., 489; 50 Conn., 128 (S. C., 13 Am. & Eng. R. R. Cas., 589); 34 W. Va., 45.

FROM JEFFERSON.

Appeal in error from Circuit Court of Jefferson County. W. R. HICKS, J.

PARK, KING & PARK for Sinard.

JOUROLMON, WELCKER & HUDSON for Railway.

MCALISTER, J. Plaintiff owned a farm in Jefferson County, which was intersected by the Southern Railway. In the original construction of the road a cut was made for the tracks, which left a rather high embankment on either side. The plaintiff turned

a mare into his field to graze, and the animal, being blind, walked over this embankment and was killed. This suit was to recover damages for the loss of the mare. In the Circuit Court verdict and judgment were in favor of the railroad. Plaintiff appealed, and assigns as error the refusal of the trial Judge to charge that it was the duty of the railroad to have fenced this embankment. As already stated, this cut was made in the original construction of the road, and has been in use about thirty years.

It is not insisted that the animal was struck by the locomotive or train of the company, but it is admitted she was killed by the fall. Under the fence statute of 1891, railroad companies maintaining unfenced tracks are made liable for the killing of stock only in cases where the stock is struck, killed, or crippled by the locomotive or cars—that is to say, by a moving engine, car, or train. There was no collision in this case, and hence the statute is inapplicable. Elliott on Railroads, Sec. 1207; *Railroads* v. *Crider*, 91 Tenn., 489. It is insisted, however, that independent of the Act of 1891, it was the duty of the company to have fenced or barricaded this embankment.

We do not concur with counsel in this contention. At common law no duty rested upon a railway company to fence its track, and it was not liable for animals killed or injured upon its track, merely because it failed to erect fences. The over-

whelming weight of authority is that the duty to fence exists only as a result of legislative enactment. 3 Elliott on Railroads, Secs. 1180, 1181; *Campbell* v. *New York R. R. Co.*, 50 Conn., 128 (S. C., 13 Am. & Eng. R. R. Cas., 589); *Clark* v. *Ohio R. R. Co.*, 34 W. Va., 45.

Affirmed.

IRON CO. *v.* PACE.

(*Knoxville.* November 11, 1898.)

1. VERDICT. *Supported by sufficient evidence, when*

The Court holds, upon the facts stated in the opinion, that there is sufficient evidence to support the verdict in favor of plaintiff, upon the theory that the explosion that caused plaintiff's injury resulted not from his negligence in blasting, but from the defendant's negligence in failing to provide a competent and diligent mine boss or inspector, and in permitting explosive dust and gas to accumulate in the mine. (*Post, pp. 478–482.*)

2. EVIDENCE. *Opinion as to competency and skill of mine boss.*

That a witness who fails to show sufficient acquaintance with a mine boss to qualify him to testify is permitted to testify, over objection, and to impeach the skill and competency of such mine boss, is not reversible error where two other witnesses with the same disqualification were permitted to testify to the same facts without objection. The evidence in such case is merely cumulative. (*Post, pp. 482, 483.*)

3. SAME. *Report of State Mine Inspector.*

The admission, over objection, of a portion of the report of the State Mine Inspector, to prove that mine dust is explosive, is not reversible error where the objecting party concedes that mine dust is explosive. (*Post, p. 483.*)

4. NEW TRIAL. *Misconduct of jury.*

This Court will not reverse the action of the lower Court overruling a motion for new trial upon the ground that the jurors, while deliberating on their verdict, gave and heard additional facts where several jurors, including the offending juror, denied the charge. (*Post, pp. 483, 484.*)

5. MASTER AND SERVANT. *Degree of care required of master.*

A charge is correct which, taken as a whole, instructs the jury that "it is the duty of the master to keep his premises, used in

the prosecution of his business, in a reasonably safe condition, and, if he fails to do so, he is liable to the servant for all injuries resulting to him from such defects." (*Post, pp. 484–486.*)

6. SAME. *Degree of care required of servant.*

A charge is correct which, in substance, instructs the jury that a servant cannot recover for injury resulting from the dangerous condition of a coal mine, if he knew or could, by the exercise of ordinary care, have discovered and averted the danger and injury. But it is not sufficient that the servant knew, or could, by the exercise of ordinary diligence, have known, of the conditions or defects that existed; he must have known also of the risk or danger attending the conditions or defects, or must have been able, by the exercise of ordinary care, to have discovered the risk or danger. (*Post, pp. 486–489.*)

Case cited and distinguished: Coal Creek Mining Co. *v.* Davis, 90 Tenn., 715.

7. COAL MINES. *Mine boss.*

Under Acts 1881, Ch. 170, the mine boss required to be furnished by the owner of a coal mine, must, every morning, examine the mine not only for noxious and explosive gases, but for mine dust or other things that may endanger life or health of the miners, and remove every such thing, and see that the mine is "free from all danger." (*Post, pp. 484–486.*)

Act construed: Acts 1881, Ch. 170.

FROM ANDERSON.

Appeal in error from Circuit Court of Anderson County. W. R. HICKS, J.

J. A. FOWLER and JOUROLMON, WELCKER & HUDSON for Iron Co.

D. A. WOODS, X. Z. HICKS, and LUCKY & SANFORD for Pace.

MCALISTER, J. The defendant in error recovered a verdict and judgment in the Circuit Court of Anderson County against the Knoxville Iron Company for the sum of $800, damages for personal injuries. The company appealed, and has assigned errors.

The declaration charged, in the first count, that defendant company owned and operated a coal mine at Briceville, Tenn., and that plaintiff had been employed by said company to work in said mine; that it was the duty of the company to keep its mine, with all its entries, airways, and rooms, properly ventilated and free from all dangerous and explosive gases and substances, and to have said entries, airways, and rooms examined and tested by one skilled in such business every morning before said employes entered said portion of the mines, and if poisonous and explosive gases or other substances were found, to remove the same immediately or prevent the miners from entering until such removal could be made. It is then charged that defendant company, on the occasion in question, had wholly failed to perform its duty in this behalf, and, in consequence of such breach of duty, large quantities of mine dust, together with an explosive gas known as firedamp, had been allowed to accumulate in the entries, rooms, airways, and air currents of said mine. Plaintiff alleges that, at the time of the accident, he was

working and driving entry No. 10, on the right of the main entry, mining and drilling, blasting and removing coal and slate therefrom, and, while so engaged, the said mine dust and firedamp gas, which defendant company had negligently permitted to accumulate, had become stirred up, agitated, mixed, and ignited by the blasting shots in said entry, thereby causing a violent explosion, which resulted, without fault or negligence on plaintiff's part, in burning and mangling him about the head, face, body, arms, and legs, whereby he suffered the permanent loss of a great portion of his outer skin, permanently disfiguring him and disabling him from performing manual labor, causing him intense suffering both of mind and body, etc.

It is alleged in the second count of the declaration that it was the duty of the defendant company to employ a competent and practical inside overseer or mine boss, whose duty it was, either in person or by a competent and practical assistant, to examine and inspect said mines, together with the entry in which plaintiff was working, before plaintiff and the other workmen engaged therein entered said mine, and to see that the same was at all times free from dangerous and explosive gases and other substances. It is then charged that said inside overseer or mine boss was unskillful and incompetent, and that this fact was well known to defendant company, and that, on account of his negligence in allowing an accumulation of mine dust and fire-

damp gas, the injury as aforesaid was inflicted upon plaintiff.

Defendant company pleaded not guilty, the statute of limitations of one year, and that plaintiff's own negligence was the proximate cause of the injury.

There is evidence tending to show that the plaintiff, Pace, with a helper, named Smith, were employed by defendant company to work for it in its coal mine, the Cross Mountain Mine, at Briceville, and at the time of the accident these men were engaged in driving an entry, called Entry No. 10, on the right of the main entry of the mine. This was what was known as a dry entry, and large quantities of dust had accumulated near the place where these men were engaged at work. On the day of the injury plaintiff, Pace, and his helper had prepared three blasts in the face of the entry, for the purpose of removing or knocking down the coal between the cutting and the first hole. Fire was applied to the fuse in each of the holes, and the men then retreated down the entry about four hundred and nine feet, when the blasts exploded. Immediately a strong current of wind rushed down the entry, throwing Pace and Smith to the ground, enveloping them with flames, which set fire to their clothing and severely burned their bodies. Pace testified that he was blown from twelve to fourteen feet by the violence of the current.

The controverted question of fact upon the evidence, was whether the flames that burned plaintiff

resulted from mine dust explosion. The theory of the defendant company, upon the proof, was that the accident was caused by the gas and smoke generated by the explosion of the black powder in the three holes driven by Pace and his helpers, and resulted from their negligence in the use of the blasting powder and in the method of driving the holes. It was insisted on behalf of the company that the first two shots heated the air, and that the smoke and gases generated by the powder filled up the entry, and that when the third powder explosion occurred it set on fire these gases and caused the injury. There was also evidence tending to show that the method adopted by the plaintiff in blasting was improper and negligent, and that coal should be mined in what are termed steps or benches, while, on the other hand, there is evidence tending to show that the mining boss had said they could adopt their own methods.

It was insisted on behalf of plaintiff that the injuries were sustained in consequence of a mine dust explosion. There is evidence tending to show that large quantities of coal dust had been permitted to accumulate in the mine, and that such coal dust, under certain conditions, is highly explosive. The theory of plaintiff is supported by the fact that this explosion was accompanied by a loud noise, which is in accord with the expert testimony that a detonation accompanies a dust explosion, while ignition of powder smoke would cause only a puff. It is

also in proof that if this had been a powder smoke explosion, the flames would not have extended so far as plaintiff had retreated, to wit, four hundred and nine feet. Moreover, there is evidence tending to show that part of this explosion passed down entry eleven, burning the clothes and flesh of one M. L. Duncan, who was fully one thousand two hundred feet away. Plaintiff and his helper, it appears, after the explosion occurred, were covered with coal soot, as evidence of a coal dust explosion. It is further shown that, after the explosion, it was observed that patches of mine dust which had been sprinkled or watered did not burn. Without further reference to the testimony, we find material evidence in the record to support the finding of the jury, or from which they might reasonably have inferred that this was a mine dust explosion, and, under well-settled rules of practice, the verdict of the jury on the facts cannot be disturbed.

The second assignment is, the Court erred in allowing James Sheldon to express his opinion of the competency and skill of the mine boss, James Quintrell, over the objection of defendant company, since he had failed to show a sufficient opportunity for knowledge of said Quintrell to qualify him to speak on that subject, and because, under the law, it was not competent for said witness to express his opinion of the skill and competency of said mine boss.

The only exception by defendant to this testimony

in the Court below was that witness had not shown that he knew anything about Quintrell.

Two other witnesses had been permitted to testify on the subject without showing any particular knowledge of Quintrell, and no objection was interposed by defendant to their testimony, and this evidence was only cumulative.

The sixth assignment is, that the Court erred in permitting plaintiff's counsel to introduce as evidence that part of the report of F. P. Clute, Superintendent of the Bureau of Labor, Statistics, and Mines, to the Governor and Fiftieth General Assembly of the State of Tennessee, for the year 1896, from pages 1 to 16, inclusive, over the objection of the defendant iron company, as follows, to wit: (1) Because said record is not a work of science; (2) it is not a public document; (3) said report is only an *ex parte* statement of the State Mine Inspector, F. P. Clute, and not a deposition taken in regular form, with opportunity for cross-examination.

We understand the only purpose for which this book was admitted was to show that mine dust is explosive, under certain conditions, in the absence of any inflammable gases. This fact was admitted on the witness stand by defendant's superintendent of mines, and was not a controverted question of fact. We find no reversible error in admitting certain portions of this book in evidence, tending to establish a fact which defendant admitted to be true.

The eighth assignment is that the Court erred in

not granting a new trial upon the facts disclosed upon the motion therefor, viz., that, while the jury were deliberating upon their verdict, some of the jurors stated that powder smoke would not explode, and argued that any one who had had experience in blasting and shooting guns knew that to be a fact. Several of the jurors, including the juror referred to, were examined under oath by the Court on this subject, and they denied that any such statement had been made in the presence of the jury. The Court settled this question of fact by overruling the motion for a new trial, and there is ample evidence to support the finding.

The tenth assignment is that the Court erred in defining the degree of care required of a master in furnishing a safe room or entry where the plaintiff should work, and it is insisted that the effect of the charge is to make the mine owner an insurer of the safety of the premises where the servant is to work, and an insurer, also, of the skill and prudence of fellow-servants. Taking the charge as a unit, we do not think it warrants the construction contended for, and is in accord with the general rule that "it is the duty of the master to keep his premises used in the prosecution of his business in a reasonably safe condition, and, if he fails to do so, he is liable to the servant for all injuries resulting to him from such defects." Wood on Master and Servant, Sec. 334, p. 695.

The Court, in charging upon the duty devolved

on defendant company to employ a competent mine boss, was fully warranted by Chapter 170, Acts 1881, entitled "An Act to provide for the ventilation of coal mines and collieries, and for the protection of human life therein."

The eighth clause provides that, "to better secure the ventilation to either coal mines or collieries, to provide for the health and safety of the men employed therein otherwise and in every respect, the owner or agent, as the case may be, in charge of every coal mine and colliery shall employ a competent inside overseer, to be called a mining boss, who shall keep a careful watch over the ventilating apparatus, airways, tramways, pumps, timbering, signaling arrangements, tubes, etc., and all things connected with and appertaining to the safety of the men at work in the mine. He or his assistant shall examine carefully the workings of all mines generating explosive gases every morning before the miners enter the coal mine or colliery, and shall ascertain that the mine is free from all danger."

The charge in this case is not so strong as the positive mandates of the statute. The Court was certainly in error in charging the jury that the duty of inspection imposed by this Act only applied to noxious and explosive gases, and does not make it incumbent on them to remove dust from the mine by reason of inspection. The positive language of the statute is that the mine boss shall keep a careful watch over all things appertaining to the safety

of the mine, and shall every morning examine the mine to see that it is "free from all danger." It is shown that this mine did generate explosive gases.

The eleventh assignment is that the Court erred in defining the degree of care plaintiff was required to exercise for his own protection. The criticism is that the Court instructed the jury that, notwithstanding plaintiff may be perfectly familiar with all the conditions, such as that the mine is a dry one, that there is dust in it, that there is gas in it, etc., and yet, because he does not understand or discover these things to be dangerous, he may, nevertheless, recover from defendant, etc. The Court had charged that, "if the plaintiff had opportunities afforded him so that he could have seen and known there was danger of the explosion, or if he ought to have seen and known there was danger thereof, ... and, if the plaintiff failed to see the danger and avoid it, he could not recover," etc. Court also charged: "It is the duty of plaintiff to use such care and prudence for his own protection, after place to work is furnished him, as a man of ordinary prudence, situated as he was, would have used under the circumstances." Again, the Court charged that, "if plaintiff knew, or had opportunities to know, of the existence of the dust in the entry, and saw the danger therefrom, and continued in the employment, he could not recover for the injury, nor could he recover if he was skilled or had reason to apprehend danger from an explosion."

In answer to this assignment of error, it is insisted by the learned counsel for defendant in error "that plaintiff would not be barred if he had merely known of the conditions, but neither knew nor ought to have known of the danger therefrom, especially when this danger is established as a scientific conclusion from given facts, and implies a knowledge which might properly be required of the person placed in charge of the safety of a coal mine, and yet not be required of an ordinary miner. In such an employment as this, especially where the statute fixes upon the mine owner the duty of employing a competent mine boss to look after the safety of the men, while the company is held to the exercise of a reasonable care and knowledge on the part of the mine boss, such knowledge is not necessarily required of the employe, who will not be guilty of contribuory negligence unless he has knowledge of the conditions, and ought reasonably to have knowledge of the danger also." The authorities fully sustain the proposition.

Says Mr. Wood, in his work on Master and Servant: "A servant may maintain an action against his employer for injuries sustained by himself, resulting from the negligence of the employer in a matter which, from the nature of the employment, he had a right to rely upon the care and superior knowledge of the employer. It is true that the employe is bound to exercise all reasonable care and prudence, and if an injury result through his want of

care . . . he has no right of action. But in determining what would be negligence on the part of the workman, reference must be had to his limited means of knowledge, to his ignorance of the structures, machinery, and processes upon which he is employed," etc.

"In an action by a servant to recover damages for an injury, occasioned in the course of his employment by defective and unsuitable machinery, it must appear that the machinery was in fact defective; that injury was occasioned by such defect, and that the defendant had notice of it, or would have known of the defect if he had exercised ordinary care." Sec. 366, p. 742; Sec. 376, pp. 749, 750.

"Whether the servant knew of the defects, and ought to have known of the danger, is a question for the jury." Wood on Master and Servant, Sec. 377.

"It may be observed in this connection that it is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting, or which may follow, from such defects. The mere fact the servant knows the defects, may not charge him with contributory negligence or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that

the risks, and not merely the defects, existed." 14 Am. & Eng. Enc. L., p. 844, note.

These principles are not contravened in anywise by the case of *Coal Creek Mining Co.* v. *Davis*, 90 Tenn., 715, 716. It was expressly stated in that case that "Davis was an old miner, thoroughly acquainted with this mine, and aware of the character and location of these buildings. With all his experience and knowledge he must be taken to have willingly engaged in the service of this company, and to have taken upon himself the risks incident to these buildings. Being in charge of the ventilation of this mine, he was peculiarly aware of the effect of an intake of smoke resulting from the burning of these buildings. He was necessarily aware that this smoke would only reach him after permeating and filling all the passages and chambers of the mine, and that his escape would then be cut off. This danger, while a slight one, was, in the nature of things, more apparent to him than to any other servant of the company. His Honor properly charged the jury upon the effect of his knowledge."

The other assignments have been examined, but we find in them no reversible error.

The judgment is therefore affirmed.

Cox *v.* Building & Loan Association.

(*Knoxville.* November 12, 1898.)

1. Deed. *Defective certificate of acknowledgment of married woman.*

The certificate of a married woman's acknowledgment of a deed which substitutes for the statutory words "without compulsion or constraint from her husband and for the purposes therein expressed," the words "she executed said mortgage freely, voluntarily, and understandingly, and without fear or compulsion from any person," is invalid, and her deed void. *Post, p. 491.*)

Cases cited: Ellett *v.* Richardson, 9 Bax., 293; Henderson *v.* Rice, 1 Cold., 223.

2. Married Woman. *Must restore money received upon an invalid mortgage.*

A married woman cannot disaffirm her conveyance, and have it set aside, upon the ground that the certificate of her acknowledgment is defective and invalid, except on condition that she restore the money received by her and applied to her use, with legal interest thereon, and the same constitutes a lien on the land conveyed by her. (*Post, pp. 491, 492.*)

Cases cited: Bang *v.* Windmill Co., 96 Tenn., 367; Sporer *v.* Eifler, 1 Heis., 636; Aiken *v.* Suttle, 4 Lea, 103; Mette *v.* Dow, 9 Lea, 101; Federlich *v.* Glass, 13 Lea, 488; Sautelle *v.* Carlisle, 13 Lea, 391; Pitcher *v.* Smith, 2 Head, 208.

FROM WASHINGTON.

Appeal from Chancery Court of Washington County. John P. Smith, Ch.

CARR & REEVES for Sinclair and Wife.

J. B. COX for Cox.

GREEN & SHIELDS for Building & Loan Ass'n.

WILKES, J. Sinclair and wife borrowed $1,200 from the defendant association, which was received by the wife and applied principally to pay off a vendor's lien upon real estate, the title to which was in her. They executed a mortgage upon the same lot to the defendant association, to secure the amount borrowed. In this instrument Mrs. Sinclair acknowledged the receipt by her of the amount borrowed. The acknowledgment of the married woman to this mortgage was defective in that it omitted from the certificate the words "without compulsion or constraint from her husband and for the purposes therein expressed." The words actually used in the certificate are that "she executed said mortgage freely, voluntarily, and understandingly, and without fear or compulsion from any person."

We are of opinion the words used are not equivalent to those prescribed by statute, and constitute a fatal variance with those prescribed by the statute. And the instrument is, therefore, void as to the married woman. *Ellett* v. *Richardson*, 9 Bax., 293; *Henderson* v. *Rice*, 1 Cold., 223. However, having received the loan of $1,200 upon this defective instrument, she cannot disaffirm the conveyance and have it set aside, as she seeks to do,

except on condition that she restore the money received by her and legal interest thereon, and it will constitute a lien upon the land. *Bang* v. *Windmill Co.*, 12 Pickle, 367; *Sporer* v. *Eifler*, 1 Heis., 636; *Aiken* v. *Suttle*, 4 Lea, 103; *Mette* v. *Dow*, 9 Lea, 101; *Federlicht* v. *Glass*, 13 Lea, 488; *Sautelle* v. *Carlisle*, 13 Lea, 391; *Pitcher* v. *Smith*, 2 Head, 208.

This is decisive of the case, and reaches the same result as was reached by the Court of Chancery Appeals, but by a different route. That Court found that Sinclair and wife, after they made the mortgage to the association, sold the land to Cox and wife, they paying to Sinclair and wife $200 in cash and also to pay the legal liens on the property.

The Court of Chancery Appeals found, further, that, when Cox and wife bought the land and took the conveyance, they did it with the intention of contesting the association's right to enforce its mortgage, and thus obtain the lot free of any claim of the association, and this was such a fraud as would have vitiated the deed of Sinclair and wife to Cox and wife if it had been availed of as soon as discovered, but that Sinclair and wife lost their right to disaffirm this deed to Cox and wife by their laches in setting up the fraud. In the meantime, under some sort of an arrangement, Cox and wife adjusted their differences, and the association bought back the lot from Cox and wife and took a convey-

ance of the interest of Cox and wife in it. That Court finds, further, that the counsel for the association had agreed that Mrs. Sinclair might redeem the property by paying its debt upon it with interest, and it was held to this agreement, and it was so decreed by that Court, and four months' time was given for the redemption. Thus the matter, under their decree, stands, as to its results, in very much the same attitude as under the holding of this Court.

Sinclair and wife will have four months to redeem the property from this date, by the payment of the $1,200 and interest, and, if not so paid and redeemed, the Clerk of the Court below will sell the lot upon a credit of six months, and free from any right to redeem, and the proceeds, after payment of costs and expenses, will be applied to the debt of the association, and any balance will be paid to Mrs. Sinclair, and the cause will be remanded for this purpose. The costs of the cause will be borne, three-fourths by the association and one-fourth by Sinclair and wife, and, if not sooner or otherwise paid, will be reserved out of the proceeds of sale as to the association's share, and out of the surplus as to Mrs. Sinclair's, but this is not to prevent any earlier collection by the usual process of execution. We do not find it necessary to pass upon the different matters adjudicated by the Court of Chancery Appeals further than as herein indicated.

It may be objected that there is no finding of

the Court of Chancery Appeals that Mrs. Sinclair received the $1,200 loaned money. This is not, under the record, a disputed fact. It appears in the note and mortgage executed by her, and in her answer and cross bill filed in this cause. It is not necessary, therefore, to remand the cause for proof on this point.

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117 481

WEEKS *v.* MCNULTY.

(*Knoxville.* November 12, 1898.)

1. INNKEEPER. *Liability to guests.*

An innkeeper is not an insurer of the persons of his guests against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening by his negligence. (*Post, p. 499.*)

2. NEGLIGENCE. *Presumption as to origin of fire.*

No presumption of negligence arises against the owner or occupant of a house in which a fire originates. The contrary rule has been pronounced harsh and unreasonable. (*Post, pp. 499, 500.*)

Cases cited: Railroad *v.* Manchester Mills, 88 Tenn., 659; Deming *v.* Cotton Press Co., 90 Tenn.. 353; Railroad *v.* Kelly, 91 Tenn., 699; Postal Tel. Co. *v.* Zopfi, 93 Tenn., 374.

3. EVIDENCE. *Not pertinent, when.*

Under an averment that a hotel had become unsafe and dangerous by reason of the storing of inflammable substances in the cellar of an adjoining grocery store, evidence is not competent to show that oil and combustible substances were kept in the grocery store on the first floor above the cellar. (*Post, pp. 500, 501.*)

4. SAME. *Answer must be indicated.*

This Court will not reverse the action of the lower Court in refusing to permit a witness to answer a pertinent question, unless the record shows affirmatively that the answer would have been competent and material evidence. (*Post, p. 501.*)

Cases cited: Tel. Co. *v.* Barnes, 95 Tenn., 271; Holmark *v.* Molin, 5 Cold., 484; State *v.* Turner, 6 Bax., 203.

5. SAME. *Entire statement admitted.*

Where plaintiff introduces, as an admission of defendant, a portion of the latter's cross-examination on the trial of another case involving similar issues, it is not error to admit, at plaintiff's instance, his examination in chief relating to the same matters, especially when plaintiff abandons his exception by

reading the remainder of the cross-examination in rebuttal. (*Post, pp. 508, 509.*)

6. SAME. *Presumption from failure of party to testify.*

No prejudicial inference can be drawn from a party's failure to testify in his own behalf in a civil case, where it appears that he possessed no special knowledge of the facts of the case. (*Post, pp. 509, 510.*)

Case cited: Dunlap *v.* Haynes, 4 Heis., 476.

7. PROXIMATE CAUSE. *Breach of municipal ordinance.*

The Court finds, as matter of fact, that there is no proof tending to show that the death of plaintiff's husband resulted, proximately, from the absence of fire escapes on the hotel in which he perished, and that, therefore, it is unnecessary to construe the city ordinance in regard to fire escapes, or to determine whether civil liability arises from its breach. (*Post, pp. 501–508.*)

Cases cited: Queen *v.* Coal & Iron Co., 95 Tenn., 458; Deming *v.* Cotton Press Co., 90 Tenn., 353; Railroad *v.* Kelly, 91 Tenn., 699; Postal Tel. Co. *v.* Zopfi, 93 Tenn., 374; Schmalzreid *v.* White, 97 Tenn., 45.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

TEMPLETON & CATES for Weeks.

FOWLER, MYNATT & FOWLER and WASHBURN, PICKLE & TURNER for McNulty.

MCALISTER, J. Plaintiff brings this suit to recover damages for the death of her husband, Arthur E. Weeks, which is alleged to have been occasioned

by the negligence of the defendants. The grounds of liability alleged in the declaration are, first, that the defendants, at the date aforesaid, were proprietors of Hotel Knox, a public inn in the city of Knoxville, and had negligently permitted said hotel to be in an unsafe and dangerous condition; and, second, that defendants had not employed a sufficient complement of servants for the protection of the hotel and guests; and, third, that the servants employed were incompetent, whereby said hotel was, on April 9, 1897, destroyed by fire, and plaintiff's intestate, Arthur E. Weeks, who was a guest therein, lost his life. The more specific grounds of negligence are stated in the second count of the declaration, viz.: That defendants had failed to provide fire escapes, as ordered by an ordinance of the city of Knoxville, or other reasonable means of escape from said building; that defendants failed to arouse deceased or give him proper warning of said fire, and that this failure was due to defendants' omission in not employing a responsible watchman. It is further alleged that the fire was caused, and said hotel destroyed, by the negligence of defendant in allowing the cellar of his storehouse, which was situated next door to said hotel, to be filled with inflammable material. Defendants pleaded not guilty. The case was tried by a special jury, to whom a large volume of testimony was submitted. The trial resulted in a verdict and judgment for defendants. Plaintiff appealed, and has assigned errors.

The facts necessary to be stated are that the defendant, Frank McNulty, was the owner and proprietor of a public inn in the city of Knoxville, known as Hotel Knox. Plaintiff's intestate, Arthur Weeks, was a traveling man, representing the Rochester Stamping Works and the Robinson Cutlery Company, of Rochester, New York. On the evening of April 7, 1897, said Weeks reached the city of Knoxville, registered at the Hotel Knox, and was assigned to room forty-nine, on the third floor. About 3 o'clock in the morning following Hotel Knox was destroyed by fire, and said Weeks perished in the flames. The fire was first discovered by the night watchman of the hotel, who immediately gave the alarm, ascended the stairway leading to the second and third floors, knocked upon the doors, and made every effort to arouse the guests. It is in proof that the guests were all aroused and escaped, excepting deceased and one other. It is in evidence that one of the guests, as he passed out, heard some one in forty-nine pounding at the door, and noticed that he had kicked out one of the panels. If this evidence is to be credited, it tends to show that deceased heard the alarm, but had, unfortunately, fastened himself in, or, in the excitement, had lost all command of his faculties. It is also shown that parties occupying rooms on the same floor with deceased, immediately contiguous, and across the hall in opposite and diagonal directions, all received the alarm and succeeded in making

their escape. The building was provided with a front and rear stairway, but had no fire escapes. South of the Hotel Knox, and immediately adjoining, was the banking house of the Third National Bank, which being only one story in height, several of the guests leaped upon its roof from the burning hotel building. This mode of escape was accessible to deceased, since his window overlooked the roof; but it is not shown he had knowledge of it.

The general rule of law governing the liability of an innkeeper is, that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence. 11 Am. & Eng. Enc. L., p. 32.

"There is no natural presumption," said this Court, "that a fire, the origin of which is unknown, was the result of the want of care of the owner or occupant of the premises. The ancient rule of the common law, which presumed negligence in such cases, was pronounced in the reported cases to be harsh and unreasonable, and was by the statute, 6 Anne, Ch. 31, abrogated. The Courts of this country, whether regarding the statute of Anne as in force or not, have unanimously held that negligence or misconduct was the gist of the action against one upon whose premises a fire had originated, and that such negligence would not be presumed from mere proof of the loss by fire commu-

nicated from the premises of another." *Railway Co.* v. *Manchester Mills*, 88 Tenn., 659. It must be shown that the negligence of the innkeeper in this case was the proximate cause of the fire and the consequent injuries. *Deming* v. *Cotton Press Co.*, 90 Tenn., 353; *Railroad* v. *Kelly*, 91 Tenn., 699; *Postal Tel. Co.* v. *Zopfi*, 93 Tenn., 374.

We understand these principles were substantially charged by the Circuit Judge, and the issues of fact have been resolved by the jury in favor of the defendants. We find material evidence in the record to sustain these findings, and, under the rule, the verdict cannot be disturbed on this assignment.

The third assignment is that the Court erred in excluding testimony showing that defendant, McNulty, had stored in the rear of the grocery store, on the ground floor and near the elevator shaft, oils and other combustible materials. Counsel is in error in his statement of the action of the Court. The grocery store, it appears, adjoins the hotel, and is situated just north of it. It was owned by McNulty, the proprietor of Hotel Knox. The object of this inquiry was to show that defendant had been guilty of negligence in storing oils and other inflammable substances on the ground floor of the grocery store, near the elevator shaft. This testimony was excepted to by defendant, on the ground that no such negligence was alleged in the declaration. The negligence alleged was that defendants had permitted the hotel to be in an unsafe and dangerous

condition, and that they had filled the cellar with inflammable materials, but there was no allegation of negligence in storing oils and other combustible materials in the grocery store, on the floor above the basement. Moreover, it seems defendant was permitted to prove that coal oil was kept in the grocery store, but, when the question was asked, how near the coal oil was kept to the elevator shaft, an objection was interposed by defendants' counsel, which was sustained by the Court. If it be conceded that the action of the Court in sustaining the objection was erroneous, it is not shown in the bill of exceptions what the witness would have answered. It has been frequently held by this Court that the refusal of the trial Court to permit answers to pertinent questions affords no cause for reversal unless the record shows affirmatively that the answers would have been competent and material evidence. *Telegraph Co.* v. *Barnes*, 95 Tenn., 271; *Holmark* v. *Molin*, 5 Cold., 484; *State* v. *Turner*, 6 Bax., 203.

The fourth assignment is that the Court erred in excluding the ordinance of the city of Knoxville, requiring the owners and keepers of hotels to erect fire escapes thereon. The objection offered to this testimony was that the ordinance in question contemplated that notice to erect fire escapes must be given to the owner of the property by the Board of Public Works, and that no such notice was given to the owner and proprietor of Hotel Knox. The declaration, as already observed, alleged that defend-

ant had failed to provide fire escapes for Hotel Knox, as ordered by an ordinance of the city of Knoxville. The insistence of counsel for defendant is that this ordinance contains no absolute requirement for the construction of fire escapes, but only provides that the same may be required by the Board of Public Works, if, in their judgment, they are deemed necessary. It is further insisted that, under the ordinance, the supervision, control, and direction of everything pertaining to fire escapes, including the number, locality, strength, capacity, and mode of structure, is committed to the Board of Public Works, and that no plans or directions were ever furnished defendants by said board. It is insisted, however, that failure to comply with even an absolute requirement of a municipal ordinance in the erection of fire escapes will not render the delinquent party liable to a civil action for damages resulting from such neglect, especially where the ordinance provides a penalty, and does not provide in its face for the civil liability. It is conceded that a civil action will lie for an act done in violation of a prohibitory State law (*Queen* v. *Dayton Co.*, 95 Tenn., 458), but it is insisted a different rule prevails when the act is done in violation of a city ordinance. This precise question was left open and undecided by this Court in *Schmalzried* v. *White*, 97 Tenn., 45.

It was held in *Osborne* v. *McMasters*, 12 Am. Rep., 698, where a statute or municipal ordinance

imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose benefit or protection it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.

In *Bolt* v. *Pratt*, 33 Minn., 323 (S. C., 53 Am. Rep., 47), it was held that where a city ordinance, in pursuance of the charter, makes it unlawful to leave a team standing unfastened or unguarded in a street, anyone injured by a violation thereof may maintain an action against the wrongdoer.

In *Salisbury* v. *Herchenroder*, 106 Mass., 458 (S. C., 8 Am. Rep., 354), it appeared that defendant had suspended a sign over a street in Boston, in violation of a public ordinance of the city. During an extraordinary gale, the sign was blown down, and a bolt, part of the fastenings, was hurled against plaintiff's window, causing damage, for which action was brought. Held that defendant was liable, notwithstanding due care was exercised in constructing and fastening the sign. The reason was, that the defendant had placed and kept the sign there illegally, and this illegal act contributed to plaintiff's injury.

In *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S., 228, the action was to recover damages for personal injuries alleged to have been sustained by the plaintiff, a boy eight or nine years old, who

lost his arm by being run over by one of the defendant's cars. The particular negligence charged in the declaration was the omission of the railroad company to build a fence on the west line of its right of way, as required by an ordinance of the city of Chicago. The Court held that an ordinance passed in pursuance of legislative authority has the force of law within the limits of the city, and, although in case of injury to persons by reason of the failure of the company to erect such fence, such default is not conclusive of liability, irrespective of contributory negligence by plaintiff, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. "The duty," says Mr. Justice Matthews, "is due, not to the city as a municipal body, but to the public, considered as comprised of individual persons, and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." "The nature of the duty," said Justice Cooley, in *Taylor* v. *L. S. & M. S. Ry. Co.*, 45 Mich., 74, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit."

We are aware there is a line of cases which hold that when the duties enjoined by ordinance are due to the municipality, or to the public at large, and

not as composed of individuals, the rule is different, and an action will not lie for a breach of the ordinance. In many cases of the latter class it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice, and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. These cases, it is said, proceed upon the ground that it is the sole duty of the city to keep the streets in good repair and clear of snow and ice. See *Flynn* v. *Canton*, 40 Md., 312 (S. C., 17 Am. Rep., 603); *Henry* v. *Sprague*, 11 R. I., 456 (S. C., 23 Am. Rep., 502); *Vandyke* v. *Cin.*, 1 Disney, 532; *Railroad* v. *Ervin*, 89 Pa. St., 71 (S. C., 33 Am. Rep., 726).

An ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute or other law of the State, and all persons interested are bound to take notice of its existence. *Bolt* v. *Pratt*, 33 Minn., 328 (S. C., 53 Am. Rep., 51); *Heland* v. *City of Lowell*, 3 Allen, 407; *Vandine's case*, 6 Pickering, 187 (S. C., 17 Am. Dec., 357); *Gilmore* v. *Holt*, 4 Pickering, 257; *Johnson* v. *Simonton*, 43 Cal., 242–249.

The duty to erect fire escapes required by this ordinance is not due simply to the municipality, or public at large, but was a regulation designed for

the peculiar benefit and protection of individuals. It is well settled that when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. *Queen* v. *Dayton Coal & Iron Co.*, 95 Tenn., 463; *Paulery* v. *Steam Co.*, 131 N. Y., 90; *Willy* v. *Mulledy*, 78 N. Y., 314 (S. C., 34 Am. Rep., 536).

We do not, however, decide the effect of the breach of an ordinance in fixing civil liability, nor do we adjudicate the proper construction of the ordinance offered in evidence, since neither question is necessarily involved in this case, for the following reason, namely: There is no proof in the record even tending to show that the deceased lost his life in consequence of the failure to construct fire escapes, as provided by the city ordinance. The principle is recognized in all the cases that a liability cannot be predicated alone upon the breach of an ordinance, but it must affirmatively appear that the injury sustained resulted proximately from said breach.

In *Queen* v. *Dayton Coal & Iron Co.*, 95 Tenn., 458, we said: "So, we think, the employment of the minor, in violation of the provisions of the statute in question, was an act of negligence on the part of defendant, and, a causal connection between the employment and the injuries sustained by the boy being shown, there is liability. . . . The breach of the statute is actionable negligence, whenever it is shown

that the injuries were sustained in consequence of the employment. In other words, it is not enough that negligence exists, or that the ordinance was violated, unless it proximately caused the injury. *Deming* v. *Cotton Press Co.*, 90 Tenn., 353; *Railroad* v. *Kelly*, 91 Tenn., 699; *Postal Tel. Co.* v. *Zopfi*, 93 Tenn., 374.

After a very attentive reading of the record in this cause, we have failed to discover any causal connection between the death of plaintiff's intestate and the failure of defendant in error to erect fire escapes, as required by the ordinance. It is not shown that deceased was at a window or in any position where a fire escape would have afforded him any benefit whatever.

There is evidence tending to show that deceased had locked himself in his room and was heard beating on his door, trying to make his escape. It is shown that one of the windows of his room overlooked the Third National Bank building, and that deceased could, with entire safety to himself, have escaped by leaping to the roof of that building, as many others similarly situated successfully did escape. As already stated, it is not shown that deceased knew of this avenue of escape, and we cannot perceive how he would have been benefited by fire escapes, under the circumstances surrounding him. We are, therefore, of opinion that, if the contention of counsel for plaintiff in error in respect of the proper construction of this ordinance were correct, and that

its breach would constitute actionable negligence, these questions are mere abstractions in this case, since no causal connection between the violation of the ordinance and the injuries sustained by the plaintiff is shown.

The fifth assignment is that the Court erred in permitting defendants to read as evidence the stenographer's report of the examination in chief of defendant, John R. Northington, given on the trial of the case of H. L. Crowder against these defendants in the Circuit Court of Knox County. It appears that the case of Crowder against these defendants had been tried only a few days prior to this case, and on that trial John R. Northington was examined as a witness. The questions at issue in the Crowder case were identical with those involved in the present case. The plaintiff's counsel in the present trial read a large portion of Northington's cross-examination given on the former trial, for the purpose of showing admissions by Northington against his interest. Counsel for defendants then insisted the statements of Northington could not be well understood unless the whole of it was read, and thereupon offered to read the remainder of his evidence. The Court ruled that defendant's counsel had the right to introduce the whole of the statement where any part of it is offered by the other side, and thereupon defendant read the whole of Northington's examination in chief, and plaintiff read the whole cross-examination, including the portion

her counsel had previously read. We think, after reading the testimony of Northington, that the cross-examination read by plaintiff's counsel could not be fully understood without reading the examination in chief. Says Mr. Wood, in his work on Practice and Evidence, Sec. 160: "An important rule relating to the admissions of a party is that the whole statement containing the admission must be taken together, whether the admission is verbal or written; for, although some part of it may contain matter favorable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be proven, yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained." Of course it is not admissible, under this rule, to read matters wholly disconnected and apart from the matter which constitutes the admission, but the whole admission, and anything bearing upon it and explanatory of it, is competent and relevant. Moreover, it is a conclusive answer to this assignment that plaintiff in error did not stand on the exception made, but read the whole of the cross-examination.

The seventh assignment is that the Court erred in charging the jury that no prejudicial inference could be drawn against defendants in this case from the mere fact that they did not offer themselves as witnesses and testify in this case. The general rule undoubtedly is that the failure of a party to be

examined, as to matters necessarily within his personal knowledge, affords a presumption against him, where the proof is not clear, and the case he seeks to make could be proven by him if true. *Dunlap* v. *Haynes*, 4 Heis., 476.

It is shown by witness, Hacker, that defendant, McNulty, was examined at the coroner's inquest, and stated that he did not get to the hotel until after the fire, and, hence, knew nothing about the matter. It is not shown there were any facts connected with the case peculiarly within his knowledge, and which were not known so fully to any other witness. The condition of the premises, including the elevator shaft, as well as the character and habits of John Davis, the colored night watchman, were fully proved by other witnesses. In respect of M. L. Ross' testimony, this witness was introduced by plaintiff, and does not state anything calling for a denial from defendant.

Numerous assignments are made, all of which have been carefully considered, but we find in them no reversible error.

Affirmed.

PATTERSON *v.* BANK.

(*Knoxville.* November 18, 1898.)

1. REHEARING. *Petition filed within ten days.*

A petition to rehear must, under the rules of the Court, be filed within ten days after the decision is announced, and not within ten days after decree is entered. (*Post, p. 512.*)

Case cited: Adams *v.* Sharon, 89 Tenn., 335; Rules, 89 Tenn., 773.

2. APPEAL. *Dismissed, when.*

An appeal from the Court of Chancery Appeals, taken more than ten days after final decree, is barred, although a petition to rehear, which was afterwards and within ten days before appeal properly dismissed, was pending at the time the decree was entered. (*Post, pp. 512–514.*)

Act construed: Acts 1897, Ch. 131.

FROM GREENE.

Appeal from Chancery Court of Greene County. JOHN P. SMITH, Ch.

HARMON & SWINGLE for Patterson.

WILSON & PIPER and SHOUN & SUSONG for Bank.

SNODGRASS, C. J. In this cause the opinion of the Court of Chancery Appeals was delivered and filed April 11, 1898. That Court has the same rule as this—that petitions to rehear must be filed

within ten days. This means ten days from the decision, as declared in the opinion, and not ten days from the entering of a decree thereon. 5 Pickle, 773, Rule 17; *Adams* v. *Sharon*, 5 Pickle, 335. A petition to rehear was filed April 28. It was correctly dismissed by the Court, on the ground that it was filed too late. The decree of dismissal was made May 11. In the meanwhile a final decree had been entered April 21, from which no appeal had been taken. But when the decree dismissing the petition to rehear was entered, May 11, the defendants prayed and were granted an appeal from that decree, as well as the final decree, entered, as already shown, on April 21, twenty days preceding.

A motion is now made here, by the appellee from the final decree, to dismiss the appeal to this Court, because prayed and granted in the Court of Chancery Appeals more than ten days after such final decree. This motion is well taken. The Act of 1897, Ch. 131, p. 312, provides that, "hereafter no writ of error, or appeal in the nature of a writ of error, shall be taken to the Supreme Court from any decree of the Court of Chancery Appeals after the expiration of ten days from the decree of the Court of Chancery Appeals." Defendants' appeal, when granted, could not therefore bring up the case for revision, and could, at most, only raise the question of error as to dismissal of petition to rehear, and this we have seen was correct.

Complainants insist that their right of appeal was

preserved by the pendency of their petition to rehear, but this could not be so, because, as we have seen, they had no petition filed with ten days from the delivery of the opinion. But if they had, it would have been immaterial, because a petition to rehear not only does not vacate a decree complained of, but does not even suspend it.

It is well settled that the pendency of a petition to rehear does not, *per se*, prevent the execution of a final decree, and parties may proceed to have it executed notwithstanding such petition, unless restrained by some order of the Court made thereon. That the Court, in a proper case, might vacate such a decree on the filing of a petition, and, upon its dismissal, again render a final decree, from which an appeal in ten days would lie, may be true, but no such action was taken in this case, even if the practice would be sustainable in a proper case, which we do not decide, but merely suggest, in this connection, for consideration when such question arises, and that it may not appear that any relief was impossible under the practice indicated.

We are all the more satisfied to lay down the rule in this case, because, if we could have considered it upon appeal, we are content with the decree on the merits. We have read the very careful and able opinion of the Court of Chancery Appeals, and, except in its assumption that the proceedings in the Greene County Court might be taken as a suggestion of insolvency, and in some other

minor particulars, we are satisfied with it. Whatever the nature of that proceeding, the Court of Chancery Appeals finds defendants were parties thereto, and were before the Court by filing claims, and and had full opportunity to contest the administratrix's settlements, which they did not do. The result is, the appeal must be dismissed, and the case remanded for execution of decree of the Court of Chancery Appeals. Such cost as has accrued on appeal from that Court to this will be paid by appellants.

STATE *v.* MURPHY.

(*Knoxville.* November 19, 1898.)

1. STATE. *Liability for fees defined.*

It is the settled policy of this State, fixed by statute and enforced by the decisions of the Courts, that no public officer shall "receive fees or other compensation for any service further than is expressly provided by law." (*Post, p. 518.*)

Code construed: § 6352 (S.); § 5269 (M. & V.); § 4517 (T. & S.).

Cases cited: Johnson *v.* State, 94 Tenn., 499; State *v.* Spurgeon, 99 Tenn., 659.

2. BACK TAX ATTORNEY. *Not entitled to fees.*

A Back Tax Attorney cannot retain his fees for sales of land, made under Sec. 95, Acts 1895, Ch. 120, and bid in for the State, out of State or county revenues in his hands collected from other delinquents. He must await disposition by the State, through the County Trustee, of each parcel of land so bid in, and receive his equitable share of the compensation for the sale and resale of each parcel from its proceeds, and not otherwise. (*Post, pp. 516–520.*)

Act construed: Acts 1895, Ch. 120, Sec. 95.

3. SAME. *Same.*

The proviso of Sec. 43, Acts 1897, Ch. 1, "that the amount of fees due the Back Tax Attorneys shall be allowed them as credits in their final settlements with the State, city, and county, said amounts to be fixed by the Courts in which bills are filed," when construed in connection with the context. clearly has no application to fees of Back Tax Attorneys making sales under Sec. 95, Acts 1895, Ch. 120, but applies alone to fees of Back Tax Attorneys in suits or proceedings pending at date of passage of Act of 1897, and brought pursuant to pre-existing statutes. (*Post, pp. 519–522.*)

Act construed: Acts 1897, Ch. 1, Sec. 43.

Case cited: Reinhardt *v.* Nealis, *ante*, p. 169.

4. STATE COMPTROLLER. *Not an authority in the construction of statutes.*

That the State Comptroller, by misconstruction of a statute, had allowed his Back Tax Attorney fees out of the State's funds that the law did not authorize him to retain, affords no reason why such Back Tax Attorney should be allowed, wrongfully and illegally, to retain like fees out of the county revenues. The opinions of fiscal agents of the State are not controlling with the Courts in the construction of statutes. (*Post*, *p.* 522.)

FROM KNOX.

Appeal from Chancery Court of Knox County. H. B. LINDSAY, Ch.

GEORGE W. WINSTEAD for State.

COMFORT & SPILLMAN, JAMES TAYLOR and CHARLES T. CATES for Murphy.

BEARD, J. The defendant, Murphy, was appointed Back Tax Attorney for the County of Knox by the Comptroller of the State, under the provisions of Chapter 120 of the Acts of the Legislature of 1895. Having qualified himself as required by that Act, he set about the discharge of his duties, and during his incumbency he collected large sums of money from delinquent taxpayers, all of which he paid over to the financial officers of the State and county, except the sum of $5,486.67, which he claimed the right to retain from the county, as compensation

for services which he rendered as such attorney in making sales of delinquent realty, under Section 95 of that Act, from which nothing was realized. Disputing his right of retention, the bill in this cause was filed to recover from him this sum.

The section referred to provided that, in all cases where no bid was received by the Back Tax Attorney, at the sales he was authorized to make, sufficient to discharge all taxes, costs, etc., upon property offered by him at public outcry, then he should bid the full amount of delinquent taxes, costs, etc., on such property for the use of the State, county, and municipality respectively, and he was thereafter empowered subsequently to sell said property at the amount of such bid, at private sale, but subject to redemption, as in other cases. The office of Back Tax Attorney was abolished by Chapter 1 of the Acts of 1897, and, by Section 87 of the same Act, all sales of real property which had been made by Back Tax Attorneys under the authority of Chapter 120 of the Acts of 1895, and at which the State had become the purchaser, were abrogated. This included and annulled the sales in regard to which the claim of defendant was set up.

The question, then, presented in this record is, can anyone who, as Back Tax Attorney, acting under the authority conferred by Ch. 120, Acts 1895, collected money in discharge of delinquent taxes, retain this money to satisfy or pay his claim for commissions and costs attending the sale of the lands

of other delinquents, where these lands were bid in by him, as provided by Section 95 of that Act?

It is the settled policy of this State, fixed by statute and enforced by the decisions of this Court, that no public officer shall "receive fees or other compensation for any service further than is expressly provided by law." Code (Shannon), § ——; *Johnson* v. *State*, 94 Tenn., 499. So, in *State* v. *Spurgeon*, 99 Tenn., 659, where attorneys representing the State, by appointment of the Comptroller, instituted, and brought to a successful termination, a suit to recover moneys due the State's revenue, sought to burden the decree for recovery with the declaration of a lien, among the reasons given for rejecting this demand, this Court said that these attorneys must look alone to the Acts under which they were appointed to ascertain their right to compensation, adding, that "compensation depends upon a collection; until this is made they have no claim."

In view of this inflexible rule of policy, we think there is no difficulty in answering the question just propounded. By Sec. 87, Acts 1895, the compensation of the Back Tax Attorney was fixed at 10 per cent. on all taxes collected by him, whether the payment was made by delinquents voluntarily, without sale, or the collection was enforced by sale. In the event a sale of delinquent property was necessary, it was provided that after an advertisement for thirty days, at the time and place fixed in the same, the attorney should sell, at public outcry, the

property advertised to the highest bidder, and, out of the proceeds of sale there should be paid all fees, costs, taxes, interest, etc. There can be no mistake in the construction of this section, and that a well defined purpose is there expressed, that in any case covered by its terms, that the Back Tax Attorney should look for his compensation, etc., alone to his collections. It is equally clear that the Acts contemplated, in all sales made by him in which property was bid off by him for the State, county, etc., that he should look for compensation, etc., alone to his ultimate recovery of proceeds from those sales. Section 95, under which the sales in question were made, and Section 96, providing, in the event the Back Tax Attorney failed to effect a public sale of the property so bid in within two years, then that he should file a bill for the enforcement of the lien for taxes, costs, etc., when taken together, leave no room for doubt on this question, so far as that Act is concerned. But it is insisted for defendant that, by necessary implication, his right to retain is secured in the last proviso to Sec. 43, Ch. 1, Acts 1897. That section provides for keeping alive all taxes and all liens for taxes, and all penalties and any right to redeem from tax sales accrued under former laws and existing at the time of the passage of the Act of 1897, and, also, that "all suits and proceedings" then "pending for collection of taxes under former existing laws, shall be continued to a final determination," as if that Act "had not been

passed." A number of provisos follow this general provision, which are not material to the present controversy. The proviso relied upon as giving the right now claimed by the defendant, is in these words: "Provided, That the amount of fees due the Back Tax Attorneys shall be allowed them as credits in their final settlements with the State, city, and county; said amounts to be fixed by the Courts in which bills are filed."

In answer to this contention, it may be said that this proviso neither determines the amount due, nor when it would be due, so that it might avail the Back Tax Attorney as a credit in his settlement; nor does the Act anywhere else settle this matter for him. So far as such attorney, acting under the provisions of the Act of 1895 is concerned, his compensation, as has been pointed out, could only come out of the proceeds of his collections, however made, and was not due until these were made. Again, it is evident that the fees covered by this proviso, were those earned by the Back Tax Attorney in some Court proceeding instituted by him; by its express terms these "fees" were "to be fixed by the Courts in which bills are filed." Thus, instead of including, we think it necessarily excluded the defendant's present claims. For, under Section 95, of the Acts of 1895, the defendant could not file bills to enforce liens for taxes, costs, etc., accrued on the delinquent property he knocked off to the State, until the expiration of two years from the time of

his sales. No bills were filed by him, and none could have been, because these sales were all abrogated by the Act of 1897, less than two years after the passage of the Act under authority of which he made them.

Then, to what class of Back Tax Attorneys did this proviso apply? We think, beyond doubt, it applied to those appointed under Acts passed prior to 1895 who had filed bills to enforce tax liens on delinquent property, which were then pending, unafected by Chapter 120 of the Acts of 1895. *Reinhardt* v. *Nealis*, 100 Tenn. (S. C., 46 S. W. Rep., 446).

While this proviso clearly does not affect the Back Tax Attorney who had been acting under this latter Act, yet such services as the defendant now seeks compensation for were not left altogether uncared for by the Act of 1897. Subsection 5 of Section 85 of that Act provides that the Back Tax Attorneys appointed under Chapter 120 of the Acts of 1895 shall turn over "all books, papers, and documents whatsoever in their hands relating to delinquent taxes" to the County Trustees of their respective counties for collection, while Subsection 6 provides: "In respect of all delinquent taxes, whether State, county, or municipal, now in the hands of said Back Tax Attorney, and here directed to be turned over to the County Trustee for collection, the said County Trustee will, in addition to all penalties, interest, and costs, also collect the fees therein provided by the said Act, Chapter 120, the Acts of

1895," and that "the said fees shall be equitably distributed as between said County Trustees and said Back Tax Attorneys." From what fund shall this equitable distribution be made? Unquestionably from the proceeds of these delinquent taxes when collections are made by the County Trustee. This may fail to compensate defendant as fully as he would have been but for the repeal of the Act of 1895, and in this way a hardship may be enforced against him, yet the Courts cannot go beyond the limits prescribed by the Legislature, and grant relief for him.

But it is urged, if not as an entire defense to the claim of complainant, at least as a strongly persuasive reason why the complainant should not be permitted to press its present demand, that, in a final settlement made by the defendant with the Comptroller of the State, that officer allowed him as a credit in his settlement, and permitted him to retain out of moneys collected by him for the State, the sum of $1,334.69, that being agreed between them as the State's proportion of commissions, costs, etc., which it was assumed had accrued to defendant from making the sales of delinquent property now in question. To this we can only say, the construction of Acts of the Legislature by the fiscal officers of the State, or by any one of them, cannot be allowed to control the Courts when they are called upon to construe the same Acts.

The result is, the decree of the Court of Chancery Appeals is affirmed, with costs.

COWAN, MCCLUNG & CO. *v.* CARSON.

(*Knoxville.* November 21, 1898.)

HOMESTEAD. *Alienation.*

Conveyance and transfer of possession to the vendee of assigned homestead by a widow, does not, since Act of 1879, operate to forfeit her right to homestead, but passes the same intact to her vendee.

Act construed: Acts 1879, Ch. —.

Cases cited and distinguished: Nichol *v.* Davidson County, 8 Lea, 389; Carrigan *v.* Rowell, 96 Tenn., 185.

FROM HAMBLEN.

Appeal from the Chancery Court of Hamblen County. HUGH G. KYLE, Ch.

SHIELDS & MOUNTCASTLE for Cowan, McClung & Co.

GEORGE P. YOE for Carson.

BEARD, J. This bill was filed by complainants to stay waste and to have their right declared in a tract of land which they had purchased, subject alone to a homestead interest. The question presented by the record is, does a sale and conveyance, for a valuable consideration, by the widow to whom

homestead had been set apart, followed by possession on the part of the alienee, forfeit or terminate the homestead right, or does it continue in the alienee?

"The general rule is that statutes creating homestead exemptions do not operate to restrain in any particular the voluntary alienation or mortgage of the homestead, unless it is so expressed." Thompson on Homesteads, Sec., 453. There is no statute in this State inhibiting the sale of a homestead, as is conceded, but it is insisted that the logic of our holdings is that alienation results in forfeiture. The case of *Nichol* v. *Davidson Co.*, 8 Lea, is relied on as recognizing this rule of forfeiture. That case, however, arose under the Act of 1868, which made occupancy essential to the continuance of a homestead. In addition, the conveyance in that case was from the husband to the wife, and it was held that the conveyance—the making of the deed by the grantor, who was the head of the family, to the wife, who was not—destroyed the homestead right. In other words, that case ruled that, under the Act of 1868, there were two things which must concur to support a homestead—that is, headship of a family and occupancy. In fact it was conceded at the bar that, under that Act, an effectual conveyance of the homestead would defeat the right, but that result was sought to be avoided on the ground that the deed in question was finally set aside, so far as the husband's creditors were concerned, upon the ground of fraud. This conclusion,

however, left the deed operative as between husband and wife, save so far as his creditors were concerned.

It is also insisted that *Corrigan* v. *Rowell*, 12 Pickle, 185, and *Harris* v. *Sipes*, 41 S. W. Rep., 443, furnish a principle, by analogy, for the contention of complainants in this case. We do not think so. The question in these causes was, whether a party entitled to homestead under our law, who abandons a residence in this State and becomes a citizen of a foreign territory, can set up this claim, and it was held that he could not, as it was a right which our laws provided alone for citizens of this State.

But it is said the direct question here presented was determined in *Tynes* v. *Stryer*, MS. Op. of this Court, Nashville, 1897. This is also an error. In that case a widow, with minor children, had homestead allotted to her out of the land of her deceased husband. Subsequently she married, and she and her second husband, for a consideration, conveyed the property, incumbered by the homestead right, to one Stryer, who went into possession. After that the minor children, by next friend, filed a bill against the grantee to recover their proportionate share of the rents of the property, resting this claim upon the theory that the homestead exemption inured to them, as well as to their mother, and that her conveyance could not defeat this right. In disposing of this contention, this Court called atten-

tion to the fact of the discrepancy between the Constitution of 1870, as to the homestead right, and the Act of the Legislature, afterward passed, to effectuate this right. By the Constitution, upon the death of the husband, the homestead inured to the widow, while by the terms of the Act in question it inured to "the widow and the minor children of the deceased." We held that the constitutional provision controlled, and that the deed of the widow could not be impeached by the minor children, and their bill was dismissed.

It will thus be seen that the insistence of complainants has not been ruled on by this Court.

As an open question, we think there is no doubt that the widow to whom homestead is assigned may alien her right in the property without working a forfeiture. The alienee will take as she does, and hold exactly as she did. Since the Act of 1879, this right does not depend on occupancy, and, this being so, it has not been doubted that the widow owning this right might, if her convenience or interest suggested, lease her homestead, and use rents instead of the property itself. A lease is a disposition of the property for a term, and, if such disposition is valid, then we think there can be no doubt that an alienation, as in the present case, will not work a forfeiture.

Decree of Court of Chancery Appeals, adjudging otherwise, is reversed.

RAILROAD *v.* HARRIS.

(*Knoxville.* November 22, 1898.)

1. EVIDENCE. *Objection to deposition.*

Objection that a deposition was taken without notice or consent cannot be successfully made at the trial or hearing. (*Post, pp. 528, 529.*)

Code construed: §§ 5661, 5662 (S.); §§ 4626, 4627 (M. & V.); §§ 3868, 3869 (T. & S.).

2. STATUTE OF LIMITATIONS. *Plea of, insufficient, when.*

A simple plea "that the cause of action arose more than one year before the bringing of this suit," presents no defense to a declaration that avers not only an original cause of action, but the bringing of suit thereon within one year after its accrual, and that same was dismissed without trial upon the merits within one year next before the present suit was instituted. The unanswered averment of the declaration, which is admitted under the rules of pleading, constitutes a sufficient answer to the plea. (*Post, pp. 529–533.*)

Code construed: §§ 4631, 4446 (S.); §§ 3620, 3449 (M. & V.); §§ 2910, 2755 (T. & S.).

Case cited and distinguished: Graham *v.* McReynolds, 88 Tenn., 240.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

COOKE, SWANEY & COOKE for Railroad.

W. T. MURRAY for Harris.

BEARD, J. This record is before us on assignments of error to the action of the trial Judge. During the progress of the trial in the Court below, the plaintiff, over the objection of the defendant, was permitted to read to the jury a deposition which had been taken by the plaintiff without notice, and of the existence of which the defendant and its attorneys were without knowledge until it was offered as a part of plaintiff's case. It is now insisted that the trial Judge was in error in overruling the objection and permitting the deposition to go to the jury.

While it is clear that this deposition, taken, as it was, without notice or consent, was subject to exclusion upon exception properly made, yet the Court below cannot be placed in error for overruling the objection at the time and in the form presented. The statute is imperative that "all exceptions to depositions for want of notice, because not filed in reasonable time, or for other causes going to the admissibility . . . . shall be made and disposed of before the commencement of the hearing or trial, otherwise they will be considered as waived." Code (Shannon), § 5661. Such an exception goes first to the Clerk, and it is his duty to act upon it forthwith, "and from his decision an appeal lies to the Chancellor or Judge, to be disposed of before the cause is heard or tried." Code (Shannon), § 5662. It is apparent that the trial Judge, in the absence of an exception acted

upon by the Clerk and carried up by appeal, was without jurisdiction to entertain the motion to exclude the deposition in question, grounded, as it was, upon a fact going to its admissibility. The surprise of the defendant company at the sudden discovery of this deposition, if an application had then been made to the Court, would have afforded sufficient reason for a withdrawal of the case from the jury and for its continuance, in order that a statutory exception might be made; yet it is not sufficient to authorize us to reverse the cause when the objection came at a time and in a manner not authorized by the statute.

Another assignment of error is that the trial Judge declined two special requests with regard to the plea of the statute of limitations. To make clear this assignment, it is necessary that a brief statement of the pleadings in the cause should be given.

This suit was brought by Harris to recover damages for a personal injury, resulting, as was alleged, from the negligence of the railroad company. In his declaration, after averring that the injury occurred on the 19th of December, 1894, it was alleged that shortly thereafter, "to wit, about the — May, 1895," plaintiff "brought suit for same in the Circuit Court of Hamilton County, Tennessee, against the said defendants, for the sum of $25,000; that on the — day of ——, 1895, the said defendant, through its . . . attorneys, removed

said suit to the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga, where and when on the 10th of April, 1896, the plaintiff was called out in default of appearance, and the said suit was dismissed on defendant's motion . . . that the cause was not tried on its merits" in either of said Courts. The present suit was instituted just sixteen days after this order of dismissal.

To this declaration the pleas of not guilty and of the statute of limitations were filed, the latter being in the following words: "And for further plea defendant says that the cause of action arose more than one year before the bringing of this suit."

This was the state of the pleadings when, on the trial of the case, the Circuit Judge was requested by the defendant to say to the jury that the defendant had pleaded that the cause of action had accrued more than one year next before the bringing of this suit, and upon this plea the plaintiff had joined issue; so that if they found that the accident which caused the injury did occur more than one year before the commencement of this suit, then they must find for the defendant. The same view, embodied in somewhat different form, was submitted in another and subsequent request. Both requests were declined, and it is now insisted that there was error upon the part of the trial Judge in so doing. In this state of the pleadings we do not think so. The plaintiff in his declaration, anticipating the plea

of the statute by defendant, had seen proper specifically to set out these allegations of facts, which, if true, relieved him from its bar by bringing his case within the saving of § 4446 of the (Shannon's) Code. It is true that he might have contented himself with a statement of his cause of action in his declaration, reserving these facts for a replication to the plea of the statute, but we know of no authority which holds that it was essential that he should do so, or that in pursuing the course he did, the plaintiff violated the rule of good pleading. The averments thus made were not traversed by the defendant. If true, it was immaterial, as was alleged in the plea, that the cause of action occurred more than one year before the institution of the suit; and that they were true, was conclusively admitted, "for all the purposes of that issue," by the defendant, when it failed to make a denial by plea. Code (Shannon's), § 4631.

We have, then, a case where the plaintiff admits in his declaration that the injury of which he complains occurred more than one year before the bringing of the present suit, and yet, coupling this admission with allegations which, if true, relieve him from the statutory bar, and which the defendant, by its failure to deny, admits to be true. In this condition of the record, we think it apparent that the plea presented an immaterial issue, and the Circuit Judge is not to be put in error for declining to submit it, as specially requested, to the jury.

But it is insisted this conclusion is in the face of *Graham* v. *McReynolds*, 88 Tenn., 240. That was an action for seduction and breach of marriage promise. The plaintiff, in her declaration, averred in substance that she reached her majority within twelve months before the institution of her suit, fixing the date of reaching her majority as the 26th of October, 1887. To this declaration a number of pleas were put in, one being the statute of limitations of one year, and another that the plaintiff attained her majority more than twelve months before the suit was brought. Under the erroneous conception that this latter plea, taken in connection with and as a traverse of the averment in the declaration as to time of plaintiff's attaining her majority, made an issue upon the statute of limitations, the plea setting up the bar of the statute, on motion of the plaintiff, was stricken out by the Circuit Judge. This was assigned for, and held by this Court to be, error. The controlling reason for this holding is found in the paragraph of the opinion which is as follows: "The sole issue presented by this plea was whether or not the plaintiff had attained her majority within twelve months before suit was brought. It is clear that, except in reply to a plea of the statute, the right of the plaintiff to recover could not be affected by the fact that she had attained her majority more than twelve months before the suit was brought. In the absence of the plea of the statute, her right to recover

would be as complete at fifty years of age as at twenty-one, and though she should admit on the witness stand that she attained her majority more than three years before suit was brought, and the jury should so find the fact, nevertheless, the Court would be compelled to pronounce judgment in her favor, in case the jury should find for her on the merits of the case." This was the exact point in question and decided, and whatever else was said in the opinion is to be taken with reference to and controlled by it. Certainly, we think, the authority of that case does not militate against the conclusion reached in this.

Judgment affirmed.

Camp *v.* Ristine.

(*Knoxville.* November 22, 1898.)

Evidence. *Expert testimony.*

Opinions of physicians, testifying as experts, are admissible in evidence to prove the value of the professional services of a physician.

Cases cited: Bruce *v.* Beall, 99 Tenn., 303; 105 U. S., 45: 4 How., 251; 88 N. Y., 299; 10 N. Y., 93; 64 N. Y., 589.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. Joseph W. Sneed, J.

Washburn, Pickle & Turner and Welcker & Parker for Camp.

Webb & McClung and E. F. Mynatt for Ristine.

Beard, J. This suit was instituted by the defendant in error, a physician, to recover from the plaintiff in error a bill for professional services. During the progress of the trial below the defend ant in error offered and there was admitted to the

jury, over the objection of plaintiff in error, the expert testimony of certain physicians to show the value of the service for which he sought a recovery; and this action of the Circuit Judge is complained of in this appeal.

In this there was no error. It is a matter of common practice in our own courts, and, so far as we know, universally regarded as a sound practice, to permit lawyers to testify as to the value of legal services, without question as to the admissibility of such evidence. 1 Whar. on Ev., Sec. 442; *Head* v. *Hargrove*, 105 U. S., 45. And this rule of competency has been extended to a great variety of cases. For instance, it has been held that a merchant may swear to the value of goods (*Buckly* v. *U. S.*, 4 How. (U. S.), 251); a dealer in clocks as to the value of a clock (*Whiton* v. *Snyder*, 88 N. Y., 299); a trader as to the value of land (*Bearss* v. *Copley*, 10 N. Y., 93), and a physician as to the value of a nurse's services (*Reynolds* v. *Robinson*, 64 N. Y., 589).

This well-recognized exception to the general rule which excludes opinion testimony, rests upon the ground that the question of value involves skill, or service, or training which the ordinary run of men do not have. 1 Whar. on Ev., Sec. 440; 7 Am. & Eng. Enc. L. (old ed.), Sec. 494.

But it is said that *Bruce* v. *Beall*, 99 Tenn., 303, holds otherwise. This is a mistake. In that case the question at issue was, had the master been

prudent or negligent in continuing the use of an elevator cable for a long series of years? The contention of the plaintiff was that he had been negligent, and, as a result, the plaintiff had sustained the injury for which he sued. This was denied by the defendant. With the issue thus made, an expert was put on the witness stand, who testified that the life of an elevator cable, employed as the one in controversy, was six or seven years; and he was then permitted, over objection, to state that it would not be prudent to use it for a longer time. In this last statement, it was held that the witness had gone beyond the limit of expert testimony and had invaded the province of the jury. In that case it was clearly competent for the witness to state, as he did, the average life of a cable used as that was; also to testify that, after such use, crystallization would set in and the smaller particles of the wire would twist and break off like glass, for these opinions or conclusions were those of special knowledge, and beyond the capacity of the common observer. But when the witness undertook to say, upon these expert deductions or conclusions of his, that such use, continued beyond the limit he had fixed for the natural life of the cable, was imprudent or negligent, he exceeded the license of an expert and settled a question the jury was sworn to try. This was the extent of the Court's holding in that case. While recognizing that matters of skill, experience, and science were the subjects of expert tes-

timony, yet the ruling there rested upon the fact that a question involving prudence or negligence was within the compass of an ordinary intelligence, and must be determined by the jury. It certainly cannot be invoked as authority against the holdings of the trial Court in the present case.

There is no error in the record, save in the amount of the judgment, which will be corrected as indicated by a memorandum accompanying this opinion, and, as corrected, it is affirmed.

FURNISH *v.* BURGE.

(*Knoxville.* November 28, 1898.)

1. CHANCERY PLEADING AND PRACTICE. *Non est factum.*

The plea of *non est factum*, in the Code form, denying that defendant executed the note sued on, or authorized it to be done, is a proper plea in a Chancery Court, and presents a full and complete defense to a plain and simple suit therein upon a note. (*Post, pp. 539–541.*)

2. SAME. *Issues for jury trial.*

Where the single issue presented by the pleadings in a chancery cause is upon the execution of the note sued on by defendant, or by his authority, an issue made up for trial by jury as to whether the note was *signed* by defendant or by his authority, is insufficient and immaterial. (*Post, pp. 541, 542.*)

Code construed: § 4661 (S.); § 3650 (M. & V.).

Cases cited: State *v.* Roberts, 11 Hum., 541; Johl *v.* Fernberger, 10 Heis., 37.

3. NON EST FACTUM. *Denial of execution relates to time of pleading.*

The denial of execution of instrument contained in plea of *non est factum* relates to the time of pleading and the status of the instrument at that time. (*Post, pp. 542–544.*)

Case cited: McElroy *v.* Melcor, 7 Cold., 140.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. MCCONNELL, Ch.

Furnish *v.* Burge.

E. Y. CHAPIN and E. M. DODSON for Furnish.

F. O. WERT and S. P. STOVER for Burge.

SNODGRASS, C. J. The bill in this cause was filed to collect a note given by defendant to J. K. Lassing, and by Lassing indorsed to complainant. It averred merely the making and indorsing of the note, the credits to which it was entitled, and the balance due, with interest, and prayed for decree. The statements of the bill were as direct and concise as a declaration, and might very well have been filed as such in a court of law. It made no further or broader question than such a declaration would have done. The defense, and only defense, was a plea of *non est factum*. It was in the Code form, and as follows: "The respondent, J. G. Burge, for plea to the bill filed against him in this case, says that the note sued on was not executed by him, or by any one authorized to bind him in the premises, and demands a jury to try the issue here tendered." The plea was properly verified on oath. Complainant joined issue on the plea. The record then discloses that respondent moved the Court for a jury, and tendered his issue as follows: "In this cause a jury is demanded to try the only issue now presented in the suit, to wit, the plea of *non est factum*." This motion the Chancellor overruled, "being of opinion that there was no proper issue tendered." A further demand for a jury was made, as follows: "In this cause a jury is demanded to try the issue of fact,

to wit: Did, or not, the defendant, Burge, sign the note sued on and the deed of trust given to secure the same." Upon this demand, a jury was ordered, and "the following issues of fact were thereupon made up by the parties, under the direction of the Court:" 1. Did, or not, the defendant, J. G. Burge, sign the note sued on in this cause. 2. Or, was, or not, said note signed by any other person authorized to bind said J. G. Burge in the premises.

The case, upon the issue of the plea thus formulated and divided, was tried, and the jury found for defendant. Decree was pronounced, and plaintiff appealed and assigned errors. The Court of Chancery Appeals reversed the Chanceller and decreed in favor of the plaintiff, as that Court says the Chancellor should have done, notwithstanding the verdict, upon a motion which plaintiff made after verdict "for decree overruling the plea, notwithstanding the verdict of the jury," which motion the Court of Chancery Appeals treats as intended to be and as equivalent to a motion for judgment notwithstanding the verdict. The defendant appealed to this Court and assigns errors.

In its opinion the Court of Chancery Appeals, finding that the Chancellor had refused to charge the jury on the subject of ratification of the note by defendant (there being evidence tending to show this), held that such refusal was proper, because no such issue was tendered. That Court then held that the issues tendered were equivalent to the plea, but

the plea itself was not a complete and entire defense, and said that a plea should only be adopted or allowed when it presents a single issue of fact or matter of defense, and that matter should be a full and in all respects a complete defense. "And," the Court continues, "treating it [the plea] as the parties did as an answer, we find that it did not constitute a complete and entire defense, because although the note sued on may not have been signed by the defendant nor by any one authorized to represent him, still the defendant may have been, as we think he was, liable on it on the ground of estoppel and of ratification. . . . On the facts developed it appears that the plea of *non est factum* did not offer a complete and thorough defense." That Court said, further: "The form of defense adopted is not the proper practice in chancery, and that other issues were presented by complainant's bill which he was authorized to prove, and did prove, and on which he is entitled to a decree notwithstanding the verdict." The Court treated the issues tendered as all right and as though they covered defendant's plea, but the plea itself as not presenting a complete defense. In all this we think there is error. The plea was in a case like this which was a plain suit on a note, proper under chancery practice, and does present a full and complete defense. Nor could a verdict if rested on it be disregarded.

But we are, further, of opinion that the issues

which the parties were required to make up, under the direction of the Court, were not issues authorized under the plea. They, at most, but present issues as to facts which are relevant on such a plea, but not conclusive. The plea is that the note sued upon was not executed by defendant, etc. The issue made up was that it was not signed by him, etc. This is not the equivalent of the plea. A party may, in the sense of the rule, execute an instrument which he never signed nor authorized to be signed. He might deliver such an instrument, or ratify it afterwards, or so act as to make it his deed by estoppel, when another sought to charge him with it. It is settled, upon authority, that an averment that one did not sign, or authorize another to sign, is not a good plea of *non est factum*. *State* v. *Roberts*, 11 Hum., 541. The issues submitted were not, therefore, the real issues made by the plea. Had they been so, the defense would have been presented fully and completely, as the plea was a full and complete defense. Under it, defendant would have had the right to prove what he might have done under the common law plea, as the Code form is its equivalent, and includes all special defenses and every special plea—that is, that the note, when the plea is filed, is not then the act and deed of defendant. Code (Shannon) § 4661, and notes on page 1154, under Plea of *non est factum; Johl* v. *Fernberger*, 10 Heis., 37–40; *State* v. *Roberts*, 11 Hum., 541.

Under the common law plea of *non est factum*, the defendant may prove that the deed was delivered and still remains in escrow; or he may take advantage of any material variance between the deed as set forth by the plaintiff and the deed produced at the trial; or may give any evidence showing that the deed either (1) was originally void, or (2) was made void by matter subsequent to its execution and before the time of pleading, for it is to the time of pleading that the averment relates. "Thus the defendant may show under this issue that the deed is a forgery; that it was obtained by fraud or was executed while defendant was insane or so intoxicated as not to know what he was about, or that it was made by a *feme covert*, or to her, but her husband disagreed to it, or that it was delivered to a stranger for the use of the plaintiff, who refused it, or that it was never delivered at all; or he may show that since its execution it became void by being materially altered or canceled by tearing off the seal. But matters which do not impeach the execution of the deed, but go to show it voidable by common law or by statute, such as usury, infancy, duress or gaming, or that it was given for ease and favor, or the like, must be especially pleaded." 2 Green. on Ev., Sec. 300.

These are sufficient citations to show what defendant may prove. Of course, what he may prove plaintiff may controvert, and thus all these are issues on such a plea. They go to the time of

pleading, when, of course, there may have supervened, between date of instrument sued on and time of pleading, both ratification and estoppel. Ratification would have made the note his own before suit (*McElroy* v. *Melcor*, 7 Cold., 140), and estoppel would have prevented his denying it, even though in fact it were not.

The decree of the Court of Chancery Appeals is reversed and case remanded to Chancery Court for trial before a jury on the plea of *non est factum*. Cost of appeal will be paid by defendant, Burge.

BRISTOL, ETC., TRUST CO. *v.* JONESBORO, ETC., TRUST CO.

101 545
110 156

(*Knoxville.* December 9, 1898.)

1. CORPORATIONS. *Corporate existence not in issue.*

Parties to a suit to wind up an insolvent corporation, who aver or admit corporate existence in their pleadings, are thereafter estopped to deny that fact. (*Post, p. 551.*)

2. SAME. *Finding of Court of Chancery Appeals that formation of, was not fraudulent, conclusive.*

The finding of the Court of Chancery Appeals that the formation of a corporation was not a fraudulent scheme or device to defraud the creditors of a partnership of a similar name and composed of the promoters of the corporation, is a finding of fact, and conclusive. (*Post, pp. 551, 552.*)

3. SAME. *Holder of stock not required.*

It is not essential that an applicant for charter, or a charter member, or a member of the board of directors, shall be a holder of stock in the corporation. A director is not an officer within the meaning of a by-law requiring all officers to be stockholders. (*Post, pp. 552, 553.*)

Case cited: Hume *v.* Bank, 9 Lea, 742.

4. SAME. *Similarity to partnership name.*

Mere similarity in the name of a corporation to that of a partnership, composed of the same persons—*e. g.*, "The Bluff Manufacturing Co." and "Bluff Manufacturing Company," cannot, as matter of law, be treated as a device to defraud the partnership creditors. (*Post, p. 553.*)

Cases cited: Memphis Water Co. *v.* Magens & Co., 15 Lea, 43; 125 U. S., 525.

5. SAME. *Organized to buy specific property.*

A corporation may be lawfully organized to buy a specific property or manufacturing plant, provided such property or plant

is useful and convenient and suitable to its purposes, and its purposes are legal. (*Post*, *p.* 554.)

Cases cited: 21 Atl. Rep., 811; 14 S. W. Rep., 579; 32 N. Y. Rep., 260.

6. SAME. *Issuance of stock in payment for property.*

The stock of a corporation may be subscribed and paid for in property suitable for corporate purposes, provided the same is fairly done and in good faith. (*Post*, *p.* 554.)

Code construed: § 2335 (S.); § 1856 (M. & V.).

Cases cited: Thornton *v.* Payne, 6 Lea, 284; Albitztigui *v.* Guadalupe Co., 92 Tenn., 605.

7. SAME. *Transfer of partnership property to, not fraudulent.*

The transfer in good faith, by a solvent firm, of its entire assets to a corporation, in consideration of the issuance of its entire stock to the partners, will be upheld in a contest between existing creditors of the partnership and creditors of the corporation after both have become insolvent. (*Post*, *pp.* 554–556.)

Case cited and approved: Carver Gin Co. *v.* Bauman, 85 Tenn., 712.

Cited and distinguished: Barcroft *v.* Snodgrass, 1 Cold., 430; Anderson *v.* Norton, 15 Lea, 28; Vance *v.* McNabb Coal Co., 92 Tenn., 47.

8. SAME. *Proceeds of fire policies go to corporate creditors.*

The proceeds of fire policies taken out upon the corporate property by the corporation, or transferred to it, and on which the premiums have been paid by the corporation, go to corporation creditors, notwithstanding an attempted transfer, without corporate direction, of such policies, after the fire and the insolvency of the corporation had occurred, by the officers of the corporation for the benefit of their individual and partnership creditors. (*Post*, *pp.* 556, 557.)

9. SAME. *General insurance does not inure to the special benefit of bonds.*

General insurance taken by a corporation upon its property does not inure to the special benefit of bonds taken and held as collateral for a loan to the corporation upon a promise of its officers, which was never performed, that special insurance would

be effected to secure such bonds. General insurance inures to the benefit of all bonds alike. (*Post, pp. 557–559.*)

Cases cited: 71 Fed. Rep., 797; 8 Page, 437; 32 Am. & Eng. Corp. Cas., 189.

10. SAME. *Bonds held as collateral canceled, when.*

When the liability for which corporate bonds have been deposited as collateral security has been discharged and satisfied, the bonds will be ordered canceled. (*Post, pp. 560, 561.*)

11. BILLS AND NOTES. *Innocent purchaser.*

The indorsee of a note, being otherwise entitled to protection, cannot invoke the plea of innocent purchaser where he takes the note upon the faith of a letter that gives him notice of equities. (*Post, pp. 559, 560.*)

FROM SULLIVAN.

Appeal from Chancery Court of Sullivan County. HUGH G. KYLE, Ch.

CURTIN & HAYNES for Bristol Bank & Trust Co.

KIRKPATRICK, WILLIAMS & BOWMAN for Jonesboro Banking & Trust Co.

ISAAC HARR for Watauga Bank.

NEWTON HACKER for First National Bank, Jonesboro.

WASHBURN, PICKLE & TURNER for State National Bank and Receiver.

BURROW BROS. for Patterson & Fry.

J. G. Rose for Lookout Bank, of Morristown.

Newton Hacker & Son for First National Bank, Greeneville.

Shoun & Susong for M. J. Patterson.

Wilkes, J. This proceeding is a general creditor's bill to wind up an insolvent corporation and distribute its assets. The principal litigation arises out of the claims of certain banks and individuals, who are creditors of a partnership known as "Bluff Manufacturing Company." This partnership was succeeded by a corporation known as "The Bluff Manufacturing Company," which, upon its organization, took over the property and assets of the partnership, as will be hereafter more fully stated. The cause was hotly contested in the Chancery Court and in the Court of Chancery Appeals, and the contest is renewed in this Court upon the appeal of all the parties who are principally interested. As a result, we have a transcript of over fifteen hundred pages, about five hundred pages of briefs and arguments of counsel, an able opinion of the Chancellor (transcribed in the record), and an elaborate finding and opinion of the Court of Chancery Appeals, of one hundred and twenty-five pages.

Prior to September 9, 1891, A. J. Patterson and C. O. Fry, under the firm name and style of "Bluff Manufacturing Company," owned and operated a plant for the manufacture of cotton goods at Bluff

City. At that time a corporation was attempted and was organized under the name of "The Bluff Manufacturing Company." There were five applicants for the charter, and they became, under the statute, the charter members. By-laws were formulated and adopted, and by them the capital stock was fixed at $40,000, in shares of $100 each. The whole of this was subscribed by Patterson and Fry, and one share was transferred by them to Bachman, to enable him to become an officer of the corporation. The two other charter members, Curtain and Haynes, owned no stock. In payment of their subscription, Patterson and Fry transferred to the corporation the buildings, realty, and water privileges of the plant formerly owned by them as partners, but paid in no money. An election for directors was held, and the charter members were elected as the first board. Soon thereafter the board authorized the issuance of $30,000 in bonds, and directed that a mortgage be placed upon the corporate property to secure them. Twenty thousand dollars of these bonds were delivered to the partnership in payment of the machinery of the plant; $10,000, or the remainder of the bonds, were retained in the treasury for future uses or emergencies. A stock of goods, material, etc., on hand, was transferred by the partnership to the corporation, and credit given the former upon the books of the corporation, and thus the entire property of the partnership was passed over to the corporation. When this transaction took place and this transfer

was made, the partnership was indebted to various parties, including the First National Bank of Jonesboro, the First National Bank of Greeneville, the Jonesboro Banking and Trust Company, the Watauga Bank, a bank at Morristown, one at Knoxville, and probably others. The notes held by these banks were afterwards, from time to time, renewed by the partnership, and some, if not all, were secured by delivering to the banks a portion of the $20,000 in bonds owned by the partners.

Certain fire insurance taken out by the partnership was transferred to the corporation, and other insurance was taken out by the latter, the aggregate amount being about $18,500. In August, 1892, the buildings, machinery, and stock on hand were destroyed by fire. When the fire occurred the policies were on deposit with the First National Bank of Jonesboro, and on the day after the fire Patterson & Fry took them out and delivered them to the various banks, as collateral for the debts due by the partnership to the banks. Payment of the policies was resisted by the insurance companies, and suits were brought by the banks to recover upon them, and, pending these suits, this bill was filed May 26, 1893, as a general creditors' bill to wind up the corporation as insolvent. Amended bills, cross bills, and answers, and other pleadings were filed and proceedings had, until a voluminous record was made. A final decree, fixing the rights of the parties, was rendered in the Court below, from

which all parties appealed. The case, on hearing in the Court of Chancery Appeals, was elaborately argued, and the decree of the Chancellor was modified, and all parties have appealed to this Court.

We can only notice the most prominent and controlling features in the case, and these very briefly.

It is insisted there was no valid and legal incorporation. The Chancellor held that this question was not properly raised by the pleadings, and that the banks, in their answers and pleadings, had admitted the corporate existence, and were estopped, in the subsequent proceedings, from denying it. In this holding, we are of opinion the learned Chancellor was correct, and this feature of the case might be safely rested here, but the Court of Chancery Appeals has given, in great detail, the different steps taken to organize the corporation, and has fully considered the criticisms made, the main contention of fact being that the formation of a corporation was merely a scheme and fraudulent device to avoid the payment of the partnership's debts. The Court of Chancery Appeals, upon a full review of all the facts bearing on this feature of the case, finds that no fraud was intended; that the partners, Patterson & Fry, were amply solvent when the transaction occurred, and continued so for some time thereafter, and had ample assets to meet all the debts of the partnership, even after the corporation had been formed; that the incorporation took away nothing from the reach of creditors, but the stock and bonds

issued to Patterson and Fry, the partners, stood in the place and stead of the property. This, being a finding of fact in the main, is binding and conclusive upon us.

As to the legal aspect of the incorporation, the Court of Chancery Appeals report that it was attempted to be made under the general incorporation laws and amendments; that the charter was in form and registered as required by law, and that there was an organization thereunder; that by-laws were adopted, the amount of capital stock fixed thereby, the whole of it subscribed by Patterson and Fry, and paid fully by a transfer of the real estate and water power, which conveyance was also registered; that the charter members were elected the first board of directors; that Patterson was elected president, Fry vice president, and Bachman secretary and treasurer; that each of them was a stockholder, the latter owning one share, which had been transferred to him in order to make him eligible; that Curtin and Haynes, the other two directors, owned no stock. They further find that the bonds were soon thereafter issued, and the mortgage executed as the corporate action of the stockholders and board; that a seal was adopted; that by inadvertence the prefix, "The," was omitted from the impression, and its absence, afterward, sometimes supplied by writing the word, and at other times by leaving the space blank. The Court of Chancery Appeals report, as a fact, that all the requirements of the statute re-

lating to the organization of corporations were fully complied with, and that the corporation was legally formed according to the express provisions of the statute.

Referring to a number of criticisms made, we are of opinion that it is not absolutely necessary that a person should be a holder of stock in order to be an applicant for a charter, or a charter member, or a member of the board of directors. The by-laws, in this case, provided that every officer must be a stockholder, and it is evident that directors were not considered officers in the sense in which the term was used in the by-laws. The statute does not prescribe how much stock a corporation must have in order to organize and operate, nor that any share shall be subscribed before organization, nor how many stockholders there shall be. *Hume* v. *Bank*, 9 Lea, 742; Thompson on Corporations, Secs. 217, 224, 226, 247, 3858, 3859.

It is objected that the name adopted for the corporation was so nearly the same as that of the partnership that this must be treated as a fraudulent device. The Court of Chancery Appeals finds, however, that there was no fraudulent intent in fact in selecting and adopting the corporate name, and mere similarity in name cannot, as a matter of law, be treated as fraudulent. *McGowan* v. *American Tanbark Co.*, 125 U. S., 525; Thompson on Corporations, Sec. 284; *Memphis Water Co.* v. *Mugens & Co.*, 15 Lea, 43.

In answer to another criticism, we can see no valid reason why a corporation may not be organized to buy a specific property, provided it is useful and convenient and suitable to its purposes, and such purposes are legal. The object of this corporation and the purpose of its formation was to own and operate a cotton manufactory. We can see no reason why, as a matter of legal right, it could not buy a plant already established and in operation, as well as found or build and stock a new one. 2 Cook on Stockholders, p. 966, and notes; *Coaldale Coal Co.* v. *Nat. Bank*, 21 Atl. Rep., 811; *Sayers* v. *Texas Land & Mortg. Co.*, 14 S. W. Rep., 579; *Kessler* v. *Levy*, 32 N. Y., Rep., 260.

It is objected that the corporation had no valid and *bona fide* stock; that the whole of its authorized stock was subscribed by Patterson and Fry and paid for by a transfer of partnership property, and that they paid no money. We can see no valid objection to this feature of the case. Stock may be subscribed and paid for in property suitable for corporate purposes, provided the same is fairly done and in good faith. 2 Thompson on Corporations, Sec. 1645; *Thornton* v. *Payne*, 6 Lea, 284; *Albitztigui* v. *Guadalupe Co.*, 8 Pick., 605; Morawetz on Corporations, Sec. 425, 426; 2 Waterman on Corporations, Sec. 188; Code (M. & V.), § 1856.

It is said the transfer of the partnership property to the corporation was a fraud, in fact, upon the creditors of the partnership; that it was without

a valid consideration, and without proper recognition of the rights of the creditors of the partners as against the assets of the partnership. The Court of Chancery Appeals has found the contention, so far as it is based upon fraudulent intent, to be without foundation in fact, and this is conclusive. The conveyances were not voluntary and without consideration, but were based upon the transfer of $30,000 of capital stock in the corporation and $20,000 of bonds issued by it. The creditors of the partnership had no lien upon its property, the partners had none, and creditors could not have any except through the partners. *Carver Gin Co.* v. *Bauman et al.*, 1 Pickle, 712.

It is not the case of an insolvent partnership, or one dissolved by death of one of its members, where creditors may assert and maintain a lien through the partners or their representatives, as in *Bancroft* v. *Snodgrass*, 1 Col., 430; *Anderson* v. *Norton*, 15 Lea, 28. Nor is it a case similar to that of *Vance* v. *McNabb Coal Co.*, 8 Pickle, 47, where both grantor and grantee were corporations, and the grantor conveyed all its assets, while heavily indebted, for a grossly inadequate consideration, making no provision and leaving no property for the payment of the debts of the grantor corporation. Here the individual members of the firm were amply solvent, and the transfer did not affect their ability at that time to pay, and creditors had ample recourse and protection in the individual property of the members.

It must be borne in mind, in the consideration of this and kindred questions, that the rights of the creditors of the corporation are as directly involved as are those of the partnership. The former dealt with the corporation in good faith, relying upon its corporate character and capacity, and also upon the recitals of the public records, that it owned the property conveyed to it by the partnership and could trust to it for their security.

The Court of Chancery Appeals find that there was no fraud in fact, and no concealment, and the registration of the charter and conveyance to the corporation were constructive notice of its existence and ownership, and in this view we concur.

We consider next the question raised as to the proper disposition of the proceeds of the fire insurance policies. It is insisted that this insurance was effected by the partners, Patterson and Fry, for the benefit of the partnership, and not of the corporation. The Court of Chancery Appeals finds that the policies were taken out by the corporation, or transferred to it; that they were upon corporate property, and for the benefit of corporate creditors generally, and the premiums paid by the corporation, and this finding is conclusive upon us. It further appears that, in the suits brought by the banks to collect the policies, they were stated to be the property of the corporation, and suits were prosecuted in its name to effect collection. While much

criticism is made of some of the evidential facts bearing on this finding, the main facts remain untouched—that it was treated as and actually was the property of the corporation. As before stated, these policies, which up to the fire had remained on deposit in the First National Bank of Jonesboro, were, the day after the fire, transferred to various banks, as collateral for debts owing them by the partnership and then pre-existing. This was done by Patterson and Fry, not in pursuance of corporate direction or instruction, and was an illegal or unauthorized diversion of corporate assets to partnership accounts or debts, and the proceeds having been collected by the banks under an agreement to appropriate them as might be finally decided to be legal or proper, they must be placed in the treasury of the corporation, to be administered as its assets among its creditors generally.

The First National Bank of Jonesboro presents the right to hold, for itself and the First National Bank of Greeneville, the proceeds of $7,000 of this insurance, under a claim additional to and different from the other banks. Conceding that it cannot hold the insurance collected by it to secure the debts it holds against the partnership, still it says that it holds $12,000 of the bonds of the corporation as collateral. These bonds are the property of the partners, and were deposited as collateral for their debts, and as to this there is no question.

Whether this insurance shall inure to the benefit of the bonds held by this bank, or go generally to the creditors of the corporation, is the question. It is not insisted that the insurance inures to the benefit of any other bonds than this batch of $12,000 held by the First National Bank of Jonesboro. As to it, it is claimed that a note for $2,000 was renewed January, 1892, and a new note executed for $5,000 at the same time, upon an assurance and promise that insurance would be taken out to secure the $12,500 of bonds which were accepted as collateral, and, upon the faith of this assurance and promise, the extension and loan were made. The Court of Chancery Appeals, as well as the Chancellor, find that such promise was made, but that it was not executed, but the insurance was taken out, not simply to secure the bonds, or a part of them, but for the benefit of the corporation generally. Neither the mortgage nor the bonds stipulated for any insurance for their security, and the policies, on their faces, do not provide for the bonds, or even mention them; so that, prior to the fire, whatever may have been the promises, they were unexecuted, and the insurance was for the benefit of the corporation generally. At the time the fire occurred, and when the policies were, in fact, transferred to the First National Bank of Jonesboro, the corporation was still a going concern, but it was, in fact, hopelessly insolvent, and this was well known to the partners and to the bank. The

transfer was not made in pursuance of any corporate action, but by Patterson and Fry, to secure their own notes and bonds, and, under these circumstances, the attempted transfer was a fraud upon the general creditors of the corporation, and cannot be sustained, and the proceeds of this insurance, held by the First National Bank of Jonesboro and its assignee, the First National Bank of Greeneville, must be turned back into the general treasury of the corporation, for the benefit of all its creditors alike, and for general distribution, as the other insurance. Thompson on Corporations, Secs. 6503, 6405; *Germania Safety Co.* v. *Boyton*, 71 Fed. Rep., 797; *Carter* v. *Rockett Ins. Co.*, 8 Paige, 437; *Wilson* v. *Metropolitan R. R. Co.*, 32 Am. & Eng. Corp. Cases, 189.

The Bluff Manufacturing Company corporation, sold to the Bristol & Elizabethton Railroad Company a right of way across its corporate property for $1,500. The railroad company executed its notes for this amount, payable to Reynolds and others, and they were indorsed, before maturity, and delivered to the First National Bank of Jonesboro, along with $7,000 of insurance, as collateral for the debts of the partnership. This delivery was made on the day after the fire, and, along with them, was delivered a letter from Curtin & Haynes in regard to the notes. The bank claims to be an innocent holder of these notes and entitled to collect the same. Its theory is that it extended notes of the partner-

ship upon an agreement that the indorsed notes, or other notes, would be deposited, and they were deposited in pursuance of the agreement. It is insisted by the bank that it had no notice that these notes were the property of The Bluff Manufacturing Company corporation, and were justified in taking them from the partners, Patterson and Fry. The Court of Chancery Appeals report that there was nothing on the face of the notes to indicate that they belonged to the corporation, and hence it concluded that the bank had no notice, and was an innocent purchaser, or holder, of the notes, and so decreed. In this we think the Court of Chancery Appeals was in error. The notes had been refused by the bank until the letter of Curtin & Haynes was received and attached to them, showing their authority to sign the name of the railroad to them. Upon the faith of this letter and the statements contained in it, the notes were accepted by it. It was error, therefore, not to consider this letter as a part of the notes, and not to find, upon a proper and correct interpretation of its terms and language, that the notes belonged to The Bluff Manufacturing Company; so that, in our opinion, as a matter of legal construction, the bank did know of the corporation's ownership of the notes, and could not be an innocent holder. This being so, the bank cannot collect these notes from the indorsers by virtue of the doctrine of innocent holder.

It appears that $3,000 of the treasury bonds of

the corporation were delivered to Reynolds and associates, to indemnify them in the indorsement of these notes for $1,500, and their guaranty to the railroad company of title to the right of way sold to it. Whether the issuance of these $3,000 of bonds was valid or legal, we need not determine. It appears that, during the pendency of the suit in the Court below, the railroad company paid into Court in this cause $1,600 in full satisfaction of the amount of purchase money owing for the right of way, and the same was accepted by all parties as full payment, and also as a discharge of all liens and incumbrances on the right of way, and this was ratified and confirmed by the Chancellor, and affirmed by the Court of Chancery Appeals, and to it no party in interest has objected, and the fund has been directed to be paid out upon the liens according to their priorities. The liability of the railroad to the corporation being fully extinguished, the notes are satisfied as to the maker and indorsers and will be delivered up and canceled. The purpose for which the $3,000 in bonds having been accomplished, they will be returned to the treasury of the corporation and canceled along with the $7,000 of bonds, which have all the while remained in the corporate treasury, so that $10,000 of the bonds will be canceled, and only $20,000 will be allowed to share in the distribution of the assets of the corporation.

There are other minor questions in the case upon which it is not necessary to write.

The decree of the Court of Chancery Appeals will be modified as herein directed, and the costs will remain as adjudged by it, and in all other respects the decree of that Court is affirmed.

AUSTIN *v.* STATE.

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(*Knoxville.* December 21, 1898.)

1. CIGARETTES. *Statute forbidding introduction of, for sale not unconstitutional.*

A State statute that makes it a misdemeanor to bring cigarettes into the State for sale or other disposition is not a regulation of interstate commerce that is obnoxious to the commercial clause of the Federal Constitution, for the reason that cigarettes, by reason of their harmful character, are not legitimate articles of commerce. (*Post, pp. 565, 578, 579.*)

Constitution construed: Art. I., Sec. 8, Cl. 3 (U. S.).

Act construed: Acts 1897, Ch. 30.

Cases cited: 5 How., 504; 125 U. S., 465; 95 U. S., 465; 135 U. S., 100; 155 U. S., 461.

2. SAME. *Judicial notice taken of their noxious character.*

The Courts take judicial notice of the harmful character of cigarettes. (*Post, pp. 566, 567.*)

Cases cited: 171 U. S., ——; 18 La. Ann., 497 (S. C., 89 Am. Dec., 658); 11 R. I., 592; 55 Ala., 158.

3. SAME. *Revenue tax upon, does not give commercial character.*

The imposition of an internal revenue tax upon cigarettes is not a recognition of them as legitimate articles of commerce. (*Post, pp. 573, 574.*)

4. SAME. *Original package.*

Pasteboard boxes of cigarettes, each containing ten cigarettes and separately stamped and labeled, as prescribed by the United States revenue statute, are not original packages of commerce, when they are transported in an open basket which belongs to an express company. and which is filled and emptied by its agent, but the basket is the original package. (*Post, pp, 574–580.*)

Cases cited: 81 Fed. Rep., 997; 39 L. R. A., 484; 10 L. R. A., 430–432.

5. CONSTITUTIONAL LAW. *Burden on party assailing constitutionality of statute.*

All intendments are in favor of the constitutionality of every statute passed with requisite formalities; hence the burden is upon the person who assails a State's restrictive or prohibitory statute, so passed, as an unwarranted interference with interstate commerce, to show that the particular article involved is a legitimate subject of commerce. If this matter is left in doubt, the statute will be upheld. (*Post, pp. 572, 573.*)

6. STATUTES. *Unconstitutional in part.*

A statute, unconstitutional in part, may be constitutional and valid as to the residue—*e. g.*, a State statute, void as an unlawful regulation of interstate commerce may be valid in its application to internal commerce. (*Post, p. 579.*)

Cases cited: State *v.* Scott, 98 Tenn., 254; 128 U. S., 1; 123 U. S., 623; 155 U. S., 461.

FROM MONROE.

Appeal in error from Circuit Court of Monroe County. JAMES G. PARKS, J.

WELKER & PARKER for Austin.

Attorney-general PICKLE for State.

CALDWELL, J. W. B. Austin prosecutes this appeal in error from the judgment of the Circuit Court of Monroe County, whereby he was sentenced to pay a fine of fifty dollars and costs of suit, for unlawfully selling cigarettes. He admits the sale, but denies that it was unlawful.

Austin, who was a citizen and merchant of Monroe County, Tennessee, purchased from the American Tobacco Co., a New Jersey corporation, at its factory in Durham, North Carolina, a lot of cigarettes, in packages of ten cigarettes each, which it shipped thence, by express, to him at his place of business in this State; and there he sold one of these packages, without breaking, to W. G. Brown, an adult citizen of the same county.

The statute under which the conviction was had unconditionally prohibits all sales of cigarettes, whether manufactured in this State or elsewhere. It provides "that if shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this Act shall be a misdemeanor, punishable by a fine of not less than fifty dollars." Acts 1897, Ch. 30, Sec. 1.

Austin concedes that his sale to Brown was clearly within the prohibition of this Act, yet he says it was lawful, nevertheless. The substance of his contention is, that his sale was of an imported commercial article, in the original package, and that the statutory prohibition, as applied to such a sale, is obnoxious to the commerce clause of the Federal Constitution, and, therefore, null and void.

In considering this contention, we raise two vital inquiries: Whether or not cigarettes are legitimate

articles of commerce, and whether or not the sale shown in this case was of an original package in the .true commercial sense.

1. Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful; never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the Courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which, by human observation and experience, have become well and generally known to be true (*Schollenberger* v. *Pennsylvania*, 171 U. S., ——; 1 Greenl. Evi., Sec. 6; 1 Whart. Evi., Sec. 282; 1 Jones Evi., Secs. 129, 134; *Lanfear* v. *Mestier*, 18 La. Ann., 497 (S. C., 89 Am. Dec., 658, and note 693); *State* v. *Goyette*, 11 R. I., 592; *Watson* v. *State*, 55 Ala., 158); nor is it essential that they shall have been formally recorded in written history or science to entitle Courts to take judicial notice of them. *Boullemet* v. *State*, 28 Ala., 83; 12 Am. & Eng. Enc. L., 199.

It is a part of the history of the organization of

the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that, among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and, perhaps, every other reason. It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea, and alone for the protection of the people of the State from an unmitigated evil. Such being the nature of cigarettes, they cannot be legitimate articles of commerce, and, consequently, are not within the provision of the Federal Constitution (Art. I., Sec. 8, Cl. 3) in relation to the regulation by Congress of commerce with foreign nations, and among the several States, and with the Indian tribes. Only those things which are in fact commodities in some true sense, and, as such, are proper things for importation and use, can be legitimate articles of commerce and within the scope of the constitutional provision invoked by the defendant in this case. Regulation of traffic in things not suited for commerce was not by that provision delegated to Congress. Every State has the right, under its reserved police power, to prohibit the im-

portation and sale of all articles inherently unworthy of commerce and unfit for the use of its people. Indeed, an active duty rests upon the legislative branch of the State government to enact appropriate laws for the protection of the public against the hurtful influence of such articles, and, in the discharge of that important duty, the members of the Legislature must be allowed to act in accordance with the dictates of their own best judgment. This does not mean, however, that the State Legislature may override congressional legislation on the subject, or that the State has the paramount right to determine what is and what is not a legitimate article of interstate or international commerce. The reverse is true. Congress has the superior right in the determination of that question, and its decision, when made, is controlling. But, if the question arises in the State in advance of congressional action, as in the present instance, the State Legislature may and should act according to its own deliberate view of the matter, and its action, when taken, is and should be conclusive until Congress shall have given some adverse expression on the same subject. We are mindful of the rule that the silence of Congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the States shall be free and unrestricted (*Mobile* v. *Kimball*, 102 U. S., 691; *Robbins* v. *Shelly*, 120 U. S., 492; *Leisk* v. *Hordin*, 135 U. S., 100; *State* v. *Scott*, 98

Tenn., 260); but congressional nonaction upon the antecedent question as to whether or not other articles are suited for commerce, is not tantamount to an affirmation by that body that they are so. Articles of the former class are already within the domain of congressional regulation, while those of the latter class are as yet beyond that domain and within control of the States, and, from the nature of the case, must remain so, unless and until affirmatively determined by higher authority to be worthy of commerce, and thereby transferred to the other class. The right of a State to protect its people, in their comfort, health, and safety, against the importation and sale of noncommercial articles has long been recognized, and never questioned, by the Supreme Court of the United States. *License Cases*, 5 How., 504; *Bowman* v. *Chicago*, 125 U. S., 465; *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U S., 465; *Leisy* v. *Hardin*, 135 U. S., 100; *Plumley* v. *Massachusetts*, 155 U. S., 461; *Collins* v. *New Hampshire*, 171 U. S., ——; *Schollenberger* v. *Pennsylvania*, 171 U. S., ——.

In the license cases Mr. Justice Catron observed that what belongs to commerce is within the jurisdiction of the United States, and that what does not belong to commerce is within the jurisdiction of the State, and by the State may be excluded from introduction. 5 How., 600.

The statute of Pennsylvania impeached in Schollenberger's case (171 U. S., ——), was adjudged vio-

lation of the commerce clause of the Federal Constitution, because it prohibited the importation and sale of pure oleomargarine. In the course of his opinion in that case, Mr. Justice Peckham attached controlling importance to the fact that pure oleomargarine, as contradistinguished from that which was adulterated, was a wholesome article of food, and had been recognized by Congress as a commodity suitable for commerce; and, in recognition of the State's right to exclude the adulterated article, said: "The bad article may be prohibited, but not the pure and healthy one."

In Plumley's case (155 U. S., 467), it was said, in effect, by the Court, speaking through Mr. Justice Harlan, that deceptive discoloration or adulteration of imported oleomargarine removed it from the domain of congressional regulation, and subjected it to unconditional exclusion by State law.

The New Hampshire enactment involved in the Collins case (171 U. S., ——), provided for the exclusion of all oleomargarine not of a pink color. It was held to be invalid, for the reason that it virtually excluded pure oleomargarine, which was never naturally pink in color, and which was a proper and well-recognized commercial commodity.

The case of *Leisy* v. *Hardin*, 135 U. S., 100, is the one most urged upon our attention by counsel for Austin. That case, however, like all the others, recognized the right of the State, under its police power, to prevent the introduction of noncommercial

articles among its people. Mr. Chief Justice Fuller distinctly places the Court's decision upon the ground that the commodities whose importation and sale were so greatly restricted by the Iowa statute there examined, had been "recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts" as proper articles of commerce, and were, therefore, subject, in the first instance, to congressional regulation only. In the conclusion of the opinion he said: "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulation, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

That case, then, as the others that declare State restrictions and prohibitions unauthorized and invalid, is distinguishable from the present one in the fundamental and ever-controlling fact that the articles there in question were commercial commodities in some true sense, and as such appropriately recognized, while those here in question are not so. Moreover, besides the conclusive recognition received by those articles, they stand upon a higher plane in respect of inherent merit than cigarettes, for they are con-

fessedly beneficial in some instances and for some purposes, while cigarettes have no redeeming qualities. The Iowa statute, upon its face, distinctly acknowledged that the restricted articles possessed some virtue, by allowing importations and sales of them for certain purposes and under certain restrictions. In no instance has a State's right of authority and control been denied when the commodity restricted or prohibited was not first found to be a proper subject of commerce, and therefore within the jurisdiction of Congress and beyond the jurisdiction of the State. The existence of that fundamental fact has always been the decisive criterion, and the burden of showing it is upon the complaining party.

All intendments are in favor of the constitutionality of every statute passed with requisite form and ceremony (Cooley's Const. Lim. (5th Ed.), 218; Black's Const. Law, Sec. 28; Suth. Stat. Con., Sec. 332; *Railroad* v. *Harris*, 99 Tenn., 703); hence, the burden is upon the person who assails a State's restrictive or prohibitory statute, so passed, as an unwarranted interference with interstate or international commerce, to show that the particular article involved is a legitimate subject of commerce. If that fact be not made to appear in some appropriate way, his assailment must be unsuccessful.

Mr. Chief Justice Marshall, in *Brown* v. *Maryland*, 12 Wheaton, 436, wherein a State statute was challenged for repugnance to the commerce clause of the Federal Constitution, remarked: "It

has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality."

The same rule was announced and emphasized by Mr. Chief Justice Waite in this language: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases*, 99 U. S., 718.

If there were only a doubt, then, that cigarettes are legitimate articles of commerce, that doubt would be resolved against the defendant and this Act would be sustained. But, as already stated, they are clearly not so, as the Court may judicially know (*Schollenberger* v. *Pennsylvania*, 171 U. S. ——), and the passage of the Act is a legislative determination to that effect, which must be treated as conclusive of the question, in the absence of congressional expression to the contrary. Congress has laid a tax on cigarettes, prescribing the forms in which they may be put up and the manner in which they shall be stamped. Rev. Stat. U. S., Sec. 3392. This was done, however, for purposes of revenue only, and, without more, was not a recognition of them as legitimate articles of com-

merce. It was no expression on the subject of commerce one way or the other. Indeed, all internal revenue legislation is referable to a different provision of the fundamental law (Const. U. S., Art. I., Sec. 8, Cl. 1), and should be construed as relating to questions of revenue only, unless obviously intended to include some additional subject, which is not true in this instance. The fact that Congress has declared by general statute (Rev. Stat., Sec. 3243) that the payment of any tax imposed by the internal revenue laws for the carrying on of any trade or business shall not authorize the pursuit of that trade or business in any State forbidding the same, nor prohibit State taxation thereon, indicates unmistakably that Congress does not intend by the imposition of such special tax to reach, determine, or in any way affect questions appertaining to interstate or international commerce. The imposition of the tax is aside from all these questions. The statement herein that the taxation of cigarettes is not a recognition of them as proper commercial commodities, is sustained by the reasoning and decision in the case of *Plumley* v. *Pennsylvania*, 155 U. S., 461.

2. Was the sale shown to have been made in this case a sale of an original package, in the true commercial sense? We think not. It may be truly said to have been an original package for the purposes of taxation, because put up by the manufacturer, in the first instance, in one of the forms

prescribed by the internal revenue statute (Rev. Stat. U. S., Sec. 3392); yet it was not an original commercial package, because not sold and transported apart from other like articles, but in the same general receptacle with them. Speaking generally, we would say that an original package, as applied to interstate and international commerce, is a package, bundle, or aggregation of goods, put up, in whatever form, covering, or receptacle, for transportation and as a unit transported from one State or nation to another.

In *Guckheimer* v. *Sellers*, 81 Fed. Rep., 997, the Court said: "An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package; but, if a number are fastened together and marked, or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or other receptacle constitutes the original package."

The Supreme Court of Iowa considered this question in *McGregor* v. *Cone*, 39 L. R. A., 484, and, upon the authority of numerous cited cases, ruled, as correctly stated in the headnote, as follows: "(1) An original package is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. (2) The determination of the

internal revenue department that a package is a proper and original package for purposes of taxation, does not show that it is an original package of commerce. (3) A pine box, in which are packed for commercial shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce; and, when that is opened, the packages of cigarettes are subject to the police power of the State, as a part of the common mass of property therein."

The material facts of the present case are, that the defendant purchased from the American Tobacco Co., at its factory in Durham, North Carolina, a lot of cigarettes, manufactured by that company at that factory, and there, by it, put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that, after defendant's purchase, the American Tobacco Co. piled upon the floor of its warehouse in Durham, North Carolina, the number of boxes or packages sold, and, having done so, notified the Southern Express Co. to come and get them; and said company, by its agent, took them from the floor and placed them in an open basket, already and previously in the possession of the Southern Express Co., and, in that basket, had them transported by express to the defendant's

town in Tennessee, and there an agent of the same express company took the basket to the defendant's place of business, and lifted from it, on to the counter of the defendant, the lot of detached boxes or packages of cigarettes, and thereupon took a receipt, and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages, without breaking it, and for that sale he stands convicted.

Under these facts, it is entirely manifest to our minds that the basket, with its contents, made one original package in the true commercial sense, each box or package of cigarettes being a constituent part thereof, and that the original commercial package was broken, and each box or package of cigarettes assumed a separate identity before the law, when the basket was relieved of its contents. This is true, though the basket was open all the while, and was filled and emptied by the agent of the express company. A box, crate, barrel, or basket, filled with goods for shipment, and actually transported from a citizen of one State to a citizen of another State, is no less a receptacle of the goods in a legal sense, and such receptacle is no less an original commercial package because open and not covered. The presence or absence of a covering to a receptacle so used is of no consequence in determining what is and what is not an original package.

In *South Dakota* v. *Chapman*, 10 L. R. A., 432, and also in *Rion* v. *Alabama*, 10 L. R. A., 430, it

appeared that whisky, in bottles separately wrapped, had been packed and shipped in uncovered boxes, furnished by the shippers, and the Court held, in each case, that the open boxes, and not the separate bottles, were the original commercial packages. The ownership of the basket used in the shipment involved in this case—whether in the shipper or the carrier—is not disclosed. If the defendant predicated anything of ownership in the carrier, the burden was upon him to show that ownership. To avail himself of the protection afforded by the Federal law in relation to the sale of original packages, he must prove every fact essential to show that his sale was of such a package. *Keith* v. *Alabama*, 10 L. R. A., 431. But we regard the question of such ownership as wholly immaterial, for, in taking the basket to the factory of the shipper and there putting the cigarettes in it, the express company's agent was acting for the seller, and the legal effect of his action was the same as if the basket had been procured and filled by the shipper alone. It is perfectly obvious, moreover, that this plan of shipment was resorted to as a mere device for the purpose of evading the State law against the sale of cigarettes. Prior to the passage of this law, as is well known, no such scheme was adopted in the transportation of such articles, and the carrier was not called upon to play so unusual a part in such a matter.

Our conclusion upon the whole case is, first, that

cigarettes are not legitimate articles of commerce, and, consequently, that their importation and sale are not within the scope of the commerce clause of the Federal Constitution, but are subject to State control and prohibition; and, secondly, that if they were legitimate articles of commerce the sale for which the defendant stands convicted was not of an original commercial package, and hence was not protected by that clause of the Federal Constitution.

Since cigarettes are not legitimate articles of commerce and as such within the domain of congressional regulation, the statute here called in question is valid as a whole—that part which prohibits the importation and sale of cigarettes manufactured out of the State, as well as that part prohibiting the sale of those manufactured in the State—and the defendant's conviction is sustainable under the statute generally, or under the former part, without reference to the question of original package. But if they were legitimate articles of commerce, and the former part of the statute, therefore, invalid, the latter part would remain valid, nevertheless (*State* v. *Scott*, 98 Tenn., 254), as an internal police regulation (*Kidd* v. *Pearson*, 128 U. S., 1; *Mugler* v. *Kansas*, 123 U. S., 623; *Plumley* v. *Massachusetts*, 155 U. S., 461); and the defendant's conviction would be sustainable thereunder, because his sale to Brown was not of an original commercial package, but only of a part thereof after it had been broken and its contents thereby made subject to the laws

of the State, like other local property of the same class. *Leisy* v. *Hardin*, 135 U. S., 100; *Schollenberger* v. *Pennsylvania*, 171 U. S., —.

We are aware that Judge Lurton, for whose opinion we have great respect, ruled otherwise in the case of *Soire* v. *State*, 82 Fed. Rep., 615, upon a record very similar to this one, yet we believe our conclusion entirely sound.

Affirm.

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f116 379

LANE *v.* DAYTON, ETC., CO.

(*Knoxville.* January 20, 1899.)

1. ACCORD AND SATISFACTION. *Bars infant's action for damages.*

It is a good defense to an infant's action at law for damages, that she had, before the institution of her suit, accepted a valuable consideration from defendant, in full satisfaction of her claim, which she still retained, undisposed of, and did not offer to return or account for otherwise than by crediting same on any recovery that she might obtain.

Cases cited: Wiley *v.* Heidell, 12 Heis., 99; McGan *v.* Marshall, 7 Hum., 121; Scott *v.* Buchanan, 11 Hum., 468; Swafford *v.* Ferguson, 3 Lea, 294; Hook *v.* Donaldson, 9 Lea, 56; Grace *v.* Hale, 2 Hum., 27; Smith *v.* Evans, 5 Hum., 70; Parker *v.* Elder, 11 Hum., 546; Nichol *v.* Stegar, 6 Lea, 396; Pilcher *v.* Smith, 2 Head, 208; Hilton *v.* Duncan, 1 Cold., 321; Wright *v.* Duffield, 2 Bax., 222; Aiken *v.* Suttle, 4 Lea, 120; Bradshaw *v.* Van-Valkenburg, 97 Tenn., 323.

Questions reserved: (1) Whether an averment that the consideration received by the infant in satisfaction of claim had been squandered, or was not on hand, will excuse tender or return of the amount. so as to enable her to sue. (2) Whether infant can, during minority, disaffirm compromise and bring action at law.

FROM RHEA.

Appeal in error from the Circuit Court of Rhea County. JAMES G. PARKS, J.

B. G. McKenzie and Frazier & Swafford for Lane.

Burkett, Miller & Mansfield for Dayton Coal & Iron Co.

Snodgrass, C. J. This is a suit at law by an infant for damages alleged to have been sustained by the negligent killing of her husband. Defendant's eighth plea was accord and satisfaction—that it had paid plaintiff $150 in cash and other consideration, aggregating $200, in full satisfaction of her claim, before the institution of this suit. The plaintiff demurred to this plea on the ground that the declaration showed that plaintiff was, and still is, an infant, and hence was not bound by such an executed contract, and was not bound to refund, or tender with the plea, the consideration received; but she averred a willingness to let the amount received go as a credit on the judgment now sought, if one is obtained. The Circuit Judge overruled the demurrer, and, plaintiff declining to plead further by way of replication, or pay or tender the consideration received, final judgment was rendered for defendant, and plaintiff appealed in error.

Here it is assumed, in argument, that plaintiff may, as a minor, and before attaining majority, repudiate an executed contract of this character, and then insisted that she may do so without refunding or tendering the consideration received, and that this is especially true where the controversy is not in

equity, but at law, as in this case; and, further, that if an infant sues for rescission or in any form of pleading attempts to rescind an executed contract of her own, made during minority, she is not bound to restore the consideration received if it has been squandered or is not on hand at the time of the repudiation of the contract, and in support of these positions several authorities are cited.

How this last proposition is, and whether it could have recognition as law in this State, we need not decide. There was no replication to the plea, averring that any part of the consideration had been squandered or was not on hand when the suit was brought or plea filed, and no defense, except by demurrer, relying on the declaration-averred infancy of plaintiff. The plaintiff expressly declined to plead further, though ordered to do so by the Court.

As to the other proposition, that the plaintiff might repudiate an executed contract, either in a court of law or equity, without refunding or tendering the consideration received, plaintiff is in error. In a case like the present, where the contract, if between persons of full age, would have been valid, and, as to an infant contractor, would, at most, have been merely voidable—nothing else appearing—there could be no repudiation without repayment or tender of consideration received. On this question, as precisely stated, there is no distinction in the rule applied, whether in a court of law or equity, and whether its application is made to an effort to

rescind during infancy or after majority. We have a case holding that, where an infant, by bill in equity, sought relief against a void contract of its ancestor in reference to real estate, no tender of the amount received by the ancestor was essential, but the property, being, of course, always in actual existence, may be charged, on final decree, with the consideration, and repayment or tender in advance excused. *Wiley* v. *Heidell*, 12 Heis., 99. But that case, and those like it, are not authority here, because that was not one where the infant received the consideration, but where the ancestor received it, and on a void sale of real estate.

In the case before us it is obvious, even if it were one of equity cognizance and brought in equity, that such relief could not be assumed as proper or appropriate, because there may never be anything due plaintiff on the original claim and no property or recovery, therefore, on which a lien could be declared. Whether, in this State, a minor, through a next friend, can repudiate at all a merely voidable executed contract as to personalty, or must wait until after his or her majority, we need not determine. It has been decided that a minor cannot thus repudiate such a contract as to realty. *McGan* v. *Marshall*, 7 Hum., 121; *Scott* v. *Buchanan*, 11 Hum., 468; *Swafford* v. *Furgeson*, 3 Lea, 294 *Hook* v. *Donaldson*, 9 Lea 56; 10 Am. & Eng. Enc. L., 643, and note (1 Ed.).

In some jurisdictions it is held that a different

rule prevails as to personalty. Many authorities are collected on this point in 10 Am. & Eng. Enc. L., 637, 643, and notes (1 Ed.). In second note of last page, a Tennessee case is cited, on affirmative proposition that the infant can before majority repudiate an executed contract as to personalty. *Grace* v. *Hale*, 2 Hum., 27. But the case is not authority for the proposition. It was, in fact, allowed there, but no question as to the right to repudiate was made. It seems to have been conceded by the parties, and other questions presented for decision. But whether or not there be a distinction in this State as to merely voidable contracts in respect to personalty and realty, as to time of repudiation and as to return of consideration, there is no sound rule enforced anywhere in which this plaintiff in the state of the pleadings in this case is entitled to recover or to reverse the action of the Circuit Judge by a showing of affirmative error.

Without regard to manner or time of her effort to repudiate, there is lacking such essential act and pleading as would give title to relief, under such general rule, as might be applied amid the diversity of judicial opinion on the several questions, or phases of the question, presented. Such a general rule is well stated in the editor's first note to the case of *Englebert* v. *Pritchett*, 26 L. R. A., 177, as follows: "The rule which comes the nearest to being general is, that all consideration which remains in the infant's possession upon his reaching majority, or at

the time of an attempted disaffirmance in case he is still under age, must be returned, but that disaffirmance will not be defeated by inability to return what he has parted with prior to such time. He will not be permitted to regain what he parted with, or refuse payment while still possessed of what he received. There have been many distinctions attempted between executory and executed contracts, and between seeking relief at law and in equity, but, with only a few exceptions, the rule as stated above has governed the decision, regardless of the facts relied on as distinguishing facts. There is no substantial ground for a distinction as to the rule to be applied, although there may be as to the manner of its application.''

On the merits, as to refunding or tendering, with some distinctions as to time and special facts, the Tennessee cases, so far as they go, rightly understood, are in accord. 5 Hum., 70; 11 Hum., 546; 6 Lea, 396. The rule is the same in case of married women and lunatics. 2 Head, 208; 1 Cold., 321; 2 Bax., 222; 4 Lea, 120; 13 Pickle, 323.

We conclude there is no error in the judgment of the Circuit Court, and it is affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1898.

GONCE *v.* McCOY.

(*Nashville.* December 17, 1898.)

1. JUDGMENT. *Satisfaction of, not set aside, when.*

A judgment creditor, who has satisfied his judgment by a bid on land, cannot have the satisfaction set aside and the judgment reinstated, in the absence of fraud upon the ground that he was disappointed in getting a life estate instead of the fee. (*Post, pp. 591–595.*)

Code construed: § 4719 (S.); § 3705 (M. & V.); § 2990 (T. & S.).

Cases cited and approved: Hayes *v.* Cartwright, 6 Lea, 145; Hill *v.* Harriman, 95 Tenn., 305.

2. LIFE ESTATE. *Value of.*

The value of a life estate is estimated, not in the light of its actual duration as subsequently developed, or by the rents

actually received, but by its value at the time it is to be charged or accounted for, estimated according to the rules or tables usually adopted in estimating the value of life estates (*Post, pp. 593, 594.*)

FROM FRANKLIN.

Appeal from Chancery Court of Franklin County. T. M. McConnell, Ch.

Estill & Turney, J. T. Matthews, and Banks & Embry for Gonce.

Lynch & Lynch for McCoy.

Wilkes, J. This bill is filed to set aside the satisfaction of a judgment and have it restored to vitality and force, and to have the judgment thus restored declared a lien upon land and the land sold to satisfy the same. . The Chancellor dismissed the bill, refusing any relief, and the complainant appealed. The Court of Chancery Appeals reversed the Chancellor, and decreed that the satisfaction be set aside; that a lien be declared for the reinstated judgment; that it be collected out of certain lands and out of a certain judgment obtained by defendant, McCoy, against Sells, the vendor of the land to him. The case was also remanded for an account of rents received by complainants and for the execution of the decree. Both parties have appealed to this

Court—the complainant from so much of the decree as holds him for rents, and the defendants from the remainder of the decree, setting aside the satisfaction and declaring a lien and decreeing a collection.

The facts found by the Court of Chancery Appeals, so far as they need be stated, are that McCoy purchased from P. G. Sells a tract of land which belonged originally to one Rice, at the price of $2,400, of which $1,200 was paid in cash, and for the balance three notes were given, each for $400. One of these notes was paid, and complainant bought the other two for $666, and claims to be an innocent holder of them. They were secured by a lien on the land. The land. by proper proceeding, was sold to satisfy the judgment obtained on these notes, amounting to $1,050, and was bought by complainant, at his debt and costs, and the judgment was thus satisfied. It appears, however, that Rice, the original owner of the land, before he conveyed it to Sells, had made a conveyance of it to Nancy McCoy, reserving a life estate in himself. One of the conditions of the conveyance to Nancy McCoy was that she should live with Rice and family until his death. She failed to do this, but left the State, and Rice thereupon filed a bill to vacate the deed, alleging that it had never been delivered and had never taken effect. Such proceedings were had that this deed was set aside, and Rice thereupon sold to William Sells, and he to P. G. Sells, and he to A. J. McCoy, as before

stated. After the vendor's lien had been enforced by Gonce, the holder of the notes against A. J. McCoy, and after the death of Rice, Nancy McCoy having also died, her heirs filed a petition setting up the original deed to their mother, and claiming the land under it, and alleging that when Rice's proceedings were had against Nancy McCoy, to vacate her deed, she was dead, and the proceeding therefore a nullity. The result of this suit was that the heirs of Nancy McCoy recovered the land from Gonce, the purchaser and holder of the notes; and Gonce thus lost the benefit of his purchase, except as to the life estate of Rice. He had possession, however, of the land, under his purchase, from November 5, 1892, to May 5, 1893, the date when Rice died, and until that date his purchase was good in any event, as he held the life estate of Rice, and was entitled to hold it, even as against the heirs of Nancy McCoy. This bill was then filed by Gonce, the purchaser of the land and holder of the notes, to set aside the satisfaction of his judgment, on the ground that, by his purchase, he had not obtained a fee simple title to the land bought. We consider this question primarily, inasmuch as, if the judgment is not set aside, the question of its lien and enforcement need not be considered.

The Court of Chancery Appeals find that when complainant bought the notes sued on he was assured by both McCoy, the maker, and Sells, the indorser, that the title to the land for which they

were given was good, and he believed he was getting a good title in fee simple to the land by his purchase. It appears that neither party had actual notice of the particular defect in title which caused the loss, and, hence, there was no fraud, though there is some evidence of a supposed defect arising from a different source known to both parties.

Gonce, as before stated, obtained by his purchase the life estate of Rice, but did not get the fee simple. He went into possession in November, 1892. Rice died in May, 1893. In this interval, Gonce had received the rents and profits of the land, and was required by the Court of Chancery Appeals to account for the same as a credit upon his judgments when reinstated and as a condition to their reinstatement. Upon this feature of the case the question is narrowed down to this: Is the creditor, who has bid his judgments on land, and thus satisfied them, entitled to have this satisfaction vacated and the judgments reinstated because he only obtained a life estate in the land, when he believed he was getting a fee simple estate and bought under that belief? Unquestionably, if there be a total failure of title and the purchaser get nothing by his purchase, such a result would follow.

The provision of the Code (Shannon, § 4719), is, in substance, that the satisfaction may be set aside by *sci. fa.* if no title is obtained to the property bought to satisfy the judgment.

But the question in this case is, does such rem-

edy, or a remedy in chancery, exist when the purchaser obtains a valid title to the property, but not the one which he understood he was getting; in other words, when the title acquired is good so far as it goes, but does not confer the quantum of estate which the purchaser expects under his purchase? It is well settled that in sales of land under decree and under execution, except in special cases, there is no warranty of title or quality, but the rule of *caveat emptor* applies, and the purchaser gets virtually nothing but the quitclaim title of the debtor defendant. In this case it appears that the complainant, as purchaser, was aware that the title to this land was questionable, and bought with this knowledge, but he did not know of the particular defect which afterward occasioned his loss, but his knowledge was of other supposed defects which were not real. He bought a property under these circumstances which originally cost $2,400, and paid for it in notes which cost him $666, and while he had no notice, as stated, of the defect in title which finally caused the loss, he did know that the title was being questioned on other grounds, and bought at the risk of this and over the protest of the defendant, McCoy, who was trying to prevent an enforcement of the vendor's lien and a sale of the land by setting up a defective title. We think that the fact that the complainant, as purchaser, got only a life estate, when he expected to get a fee simple estate, cannot entitle him to have the satis-

faction of his judgments bid on the property set aside. It is true the life estate proved to be of short duration and hence brought but little return to the purchaser. But this cannot matter. It might have continued for a long number of years and been almost as valuable as the fee, so there was neither entire failure of title nor of consideration. To hold that, because he thought or expected to get a fee, he is entitled to relief because he only got a life estate, would be proceeding upon the idea that the sale carries with it a warranty of title, not only as to validity of title, but as to quantum of estate.

He is not entitled to such relief if he obtains any "beneficial interest" by his purchase, and the Courts cannot measure the benefit or value of the interest acquired if it is substantial. *Hayes* v. *Cartwright*, 6 Lea, 145. It should be stated that Gonce, the purchaser, does not offer to refund what he really obtained by his purchase, but he objects to refunding or accounting for anything he has received, and appeals from so much of the decree of the Court of Chancery Appeals as requires him to give credit for the rents received; in other words, he insists he has a right to have his judgments restored and reinstated and still to hold on to all he has received from a sale under these judgments. In his bill he does not offer to return what he received, and while he acquired Rice's life estate under his purchase, he refuses to account for what he re-

ceived out of his purchase of it. This he cannot do. *Hill* v. *Harriman*, 11 Pick., 305. But if complainant is entitled to have the satisfaction set aside at all, it would be more proper to do so on condition that he account for the value of the life estate he obtained and not merely the rents during the time he occupied it. And the value of that life estate would be estimated, not in the light of the actual duration of the life estate as subsequently developed or the rents received during that time, but at its value at the time of purchase, estimated according to the rules usually adopted in estimating the value of life estates. To illustrate: If this life estate of Rice had continued for ten, twenty, or fifty years, and complainant had all the while been enjoying the use of the property under his purchase, it would hardly be insisted he would be entitled to have the satisfaction set aside on the ground that he had not obtained the fee. The value of the estate acquired by complainant at his purchase must be estimated at the date of the purchase and its probable value at that time, and not by its actual return as subsequently developed.

We are of opinion that the Court of Chancery Appeals is in error in holding that the complainant is entitled to have the satisfaction of the judgment in this case set aside and the judgments restored to force and vitality, but that he is bound by his purchase and the benefits received thereunder, and it is not necessary to consider the other question.

The decree of the Court of Chancery Appeals is reversed and the decree of the Chancellor affirmed, and the bill is dismissed, and complainants will pay all costs in this Court and the Court below.

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MANN *v.* RUSSEY.

(*Nashville.* December 20, 1898.)

1. PAROL SALE OF LAND. *Value of improvements not recoverable, when.*

Upon disaffirmance and rescission of a parol sale of land by the vendee or his heirs, there can be no recovery in a Court of Equity for the enhanced value of the land by reason of permanent improvements placed thereon by the vendee, unless at the time of making them he intended in good faith to carry out his contract, and failed to do so because of default or wrong of the vendor. (*Post*, *pp.* 597, 598.)

Case cited and approved: Rainer *v.* Huddleston, 4 Heis., 223.

2. SAME. *Value of improvements recoverable, when.*

But the vendee and his heirs are justified in their disaffirmance and rescission of a parol sale of land, and entitled to recover for the enhanced value of the property by reason of permanent improvements placed thereon by them, when the vendor, a man of intelligence, sold the land for at least six times its value to an ignorant negro, of very infirm mental capacity, often engaged in the vendor's service. (*Post*, *pp.* 598, 599.)

Cases cited and approved: Birdsong *v.* Birdsong, 2 Head. 291; Deadrick *v.* Watkins, 8 Hum., 520; Coffin *v.* Ruffin, 4 Cold., 487; 15 How., 42.

FROM FRANKLIN.

Appeal from Chancery Court of Franklin County.

T. M. MCCONNELL, Ch.

J. M. LITTLETON for Mann.

C. B. RUSSEY and W. H. BRANNON for Russey.

BEARD, J. The bill in this cause was filed by the widow, in her own right and as administratrix of a deceased vendee, as well as next friend of his infant heirs, against the defendant, as vendor, for the purpose of having set aside a parol sale of land, and compelling the defendant to account for so much of the purchase money as he had received, and also for permanent improvements placed upon the property by this vendee while in possession, in so far as they had enhanced its value.

No controversy is made that this sale rested in parol, and of the right of the heirs of the vendee to disaffirm, or of the administratrix to recover the purchase money paid (the statute of limitation alone out of the way), with interest, less rents accrued during occupancy by the vendee. The real objection made by the defendant is to so much of the claim of complainant as covers the enhanced value of the property from the permanent improvements made by the vendee. This objection rests on the fact that, while defendant is urging a consummation of the contract of sale and purchase, and is pressing a payment of the balance of the purchase money and acceptance of a deed by the complainants, they are repudiating the contract. For this contention the defendant relies on the rule announced in *Rainer* v. *Huddleston*, 4 Heis., 223, which is, that a vendee in a

parol sale of land who comes into a Court of Equity claiming compensation for improvements made by him, will be repelled, unless at the time of making them he intended in good faith to carry out his contract of purchase, and fails to do so because of a default or wrong of the vendor. This rule is a sound one, and it has been repeatedly recognized in subsequent cases.

If it were true that the defendant was, as his contention assumes, free from fault, and the failure to carry out the contract was attributable to the vendee or his privies in estate, then he could invoke the protection of the rule in question. But the record discloses that the defendant sold to the ancestor of complainants this property at a grossly exaggerated price—for a consideration at least six times in excess of its real value.

It is true, as is insisted, that mere inadequacy of consideration, or, to state it differently, inequality between the value of the subject-matter of the contract and the price agreed to be paid for it, will not induce a Court of Equity to avoid the contract at the instance of either party to it. But it is equally true that if this inequality or inadequacy be "so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation of the inequality of it" (*Gwynne* v. *Heaton*, 1 Br. Ch., 1), there will arise a presumption of fraud on the part of him who takes the excessive benefit from the bargain. Par-

ties competent to contract have a right, without legal interference, to make their own agreement, and fix any price they see proper to receive or pay for property. Whenever they do this deliberately and knowingly, then their contracts are beyond impeachment, whether the price agreed upon be very great or very small. It is only when the contract presents, unexplained, a case of gross inequality that the presumption of fraud arises. This presumption, however, is one of fact, and, therefore, is rebuttable. But in the absence of clear and satisfactory evidence, on the part of him who seeks the benefit of the contract, that it was entered into with deliberation or knowingly by the party resisting or repudiating it, then the presumption becomes conclusive. 2 Pomeroy's Eq., Sec. 927, note 3; 2 Warvell on Vendors, p. 846; *Deadrick* v. *Watkins*, 8 Hum., 520; *Coffin* v. *Ruffin*, 4 Cold., 487; *Egre* v. *Potter*, 15 How. (U. S.), 42; *Birdsong* v. *Birdsong*, 2 Head, 291.

In this case we have very great inequality between the value of the property sold and the price which the vendor agreed to pay for it, without any effort on the part of the vendor to rebut, by any competent evidence, the presumption of fraud arising therefrom. On the contrary, the conceded fact that the vendee was an ignorant negro of very infirm mental capacity, often engaged in the service of the vendor, who, the record discloses, is a man of intelligence, necessarily strengthens this presumption.

There is nothing in the case which precluded the complainants from relying upon this fraud in meeting or repelling the insistence of the defendant on this point.

Other objections made by the defendant have been disposed of orally.

The decree of the Court of Chancery Appeals is affirmed.

WRIGHT *v.* BROOKS.

(*Nashville.* January 7, 1899.)

EXEMPTION. *Of insurance on exempt property.*

The proceeds arising from a loss under a policy of insurance upon homestead and exempt household goods are exempt to the owner, and not subject to execution or garnishment for his debts.

Cases cited: White *v.* Fulghum, 87 Tenn., 282; Hall *v.* Fulghum, 86 Tenn., 451; Duff *v.* Wells, 7 Heis., 17; Quarles *v.* Clayton, 87 Tenn., 308.

FROM TROUSDALE.

Appeal from Chancery Court of Trousdale County.

J. S. GRIBBLE, Ch.

J. H. MCMURRAY for Wright.

J. J. TURNER for Brooks.

MCALISTER, J. The only question presented for determination upon this record is whether the proceeds of an insurance policy upon exempt property may be subjected to the payment of the debts of the insured.

Complainant, Wright, recovered judgments before a Justice of the Peace against the defendant, C. G.

Brooks, for the sums of $220 and $19.22, respectively. The present bill was filed as a garnishment bill to subject to the payment of these judgments a draft for $540, drawn by the Scottish Union National Insurance Company in favor of the defendant, C. G. Brooks. The defendant, Brooks, resists the right of the complainant to subject this draft, upon the ground that he is the head of a family, and that $320 of this insurance was on defendant's homestead, and the remainder, excepting $10, was on his exempt personal property. It is shown, and the Court of Chancery Appeals so finds, that all these items of property were covered by the policy and were destroyed by fire. The precise question here presented has never been adjudged in this State, yet our decisions furnish rulings on analogous principles. In *Crawford* v. *Carroll*, 93 Tenn., 661, it appeared that one Carroll, the head of a family, owned but two horses, one of which was negligently killed by a railroad company. He recovered a judgment against the company for the value of the horse, and this judgment a garnisheeing creditor sought to subject to the satisfaction of his debt. This Court held that the judgment represented exempt property, and was entitled to the same immunity from attachment and execution.

Again, in *White* v. *Fulghum*, 87 Tenn., 282, it appeared that a mortgage was foreclosed in the Chancery Court, at the instance of the mortgagee. In this mortgage the mortgagor and his wife had waived

their homestead right. At the sale under the foreclosure decree the property realized a sum in excess of the mortgage debt. Judgment creditors of the mortgagor filed their bill to reach this excess, claiming that the foreclosure proceedings extinguished the mortgagor's right of homestead and left the surplus of the fund subject to the debt of complainants as nonexempt property. This Court held that the mortgagor, if originally entitled to homestead in the land, was likewise entitled to homestead in the surplus proceeds realized from a sale of the land. The Court held that the fund realized from the sale of the land represents the land itself, and that those having an interest in the land have the same interest in the proceeds of sale. See, also, *Duff* v. *Wells*, 7 Heis., 17; *Hall* v. *Fulghum*, 86 Tenn., 451; *Quarles* v. *Clayton*, 87 Tenn., 308, 316.

The direct question now being adjudged has been frequently decided in other States, and it is almost uniformly held that the insurance money arising from exempt property is also exempt. Says Mr. Waples, in his work on Homestead and Exemption, p. 837: "Is the exemption of personal property to be understood as applicable to money paid for insurance after the property has been lost by fire? Take this statute: 'If the debtor is a resident of this State, and is the head of a family, he may hold exempt from execution . . . books, instruments, ...' A physician's library and instruments were exempt under this Act, and they were con-

sumed by fire. He was a resident and married. Was the insurance money exempt? The Court before which this question came answered affirmatively. It admitted that 'there is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise. There is none when such property is burnt.' The Court mentioned no ambiguity in the statute, to be interpreted either liberally or strictly, but said that the statute must be interpreted liberally, because the purpose is to secure to the debtor the books, instruments, etc., necessary to making his livelihood; to secure food, raiment, and shelter to dependent families; hence the Court concludes that, 'if exempt articles be insured and then lost, the indemnity secured by insurance stands in the place of the books.' *Reynolds* v. *Haynes* (Iowa), 49 N. W. R., 851; *Kaiser* v. *Slaton*, 62 Iowa, 463; *Mudge* v. *Lanning*, 68 Iowa, 641; *Evans* v. *Harvester Works*, 63 Iowa, 204; 67 Iowa, 646; *Leavitt* v. *Metcalfe*, 2 Vt., 256; *Milliken* v. *Winter*, 2 Dur., 256; *Tillotson* v. *Walcott*, 48 N. Y., 188."

Mr. Thompson on Homestead and Exemptions says as follows: "Another illustration of this rule is found in the case where a debtor's house, being his family homestead, burns down, the insurance money is not liable to garnishment. For the same reason, a judgment debtor, being a householder and having a family for which he provides, cannot be compelled to execute to a receiver an assignment of a policy

of insurance for $200 upon his household furniture after a loss has occurred."

In *Whitesell* v. *Jones*, 39 S. W. R., 405, it was said by the Court of Civil Appeals of Texas: "It is the settled law in this State that money due on an insurance policy on a homestead is not subject to garnishment," citing *Cameron* v. *Fay*, 55 Tex., 58; *Chase* v. *Swain*, 88 Tex., 208; 30 S. W. R., 1049.

We cordially assent to these rulings. "The protection of homes, the security of shelter for widows and orphans, would be greatly imperiled if the money standing in lieu of a family home destroyed by fire could not go to the rebuilding of it for their benefit. The spirit of homestead legislation favors the saving of such money for them, rather than the passing of it to the creditors who had no claim on the exempt property." Waples on Homestead Exemptions, 610.

Affirmed.

SELLARS *v.* SELLARS.

(*Nashville.* January 7, 1899.)

APPEAL. *Dismissal of.*

Where the record entry fails to show that an appeal was granted, it will be dismissed, notwithstanding a recital in the appeal bond that it had been granted.

FROM DEKALB.

Appeal from Chancery Court of DeKalb County. T. J. FISHER, Ch.

JOHN B. ROBINSON & SON for F. M. Sellars.

WEBB, CANTRELL & FOSTER for C. B. Sellars.

McALISTER, J. Complainant filed this bill in the Chancery Court of DeKalb County for the purpose of asserting the right of homestead in a tract of land of which her husband died seized and possessed, but which had been sold under certain judicial proceedings and purchased by the defendant, C. R. Sellars.

Defendant, Sellars, filed an answer and cross bill. Proof was taken, and upon the hearing the Chan-

cellor decreed that complainant was entitled to a homestead. He thereupon appointed commissioners to make an assignment of homestead and dower, and he also referred the cause to the Master to report as to rents. At this stage of the proceedings, and before any report from the commissioners or Master, or final decree, the defendant attempted to appeal to this Court. An appeal was allowable in the discretion of the Chancellor. The entry of appeal failed to show that it had been granted.

In the Court of Chancery Appeals, on motion of complainant, the appeal was dismissed.

Defendant appeals and assigns as error the dismissal of his appeal. The contention of defendant is that the recital in the appeal bond that the appeal was granted is sufficient. This position is untenable. The appeal bond in a case does not necessarily come under the observation of the Court, and no intendment can be made that an appeal was actually granted from such a recital in the bond. We held at Jackson, in a recent case, that a recital in the bill of exceptions that an appeal had been granted was insufficient.

Affirmed.

GORE *v.* POTEET.

(*Nashville.* January 7, 1899.)

JUDGMENT. *Assignor's liability.*

The assignor of a judgment is not liable to his assignee for the consideration paid when the judgment is subsequently reversed, especially if the assignee contracted to assume all risks of collection.

Cases cited: Simpson *v.* Moulden, 3 Cold., 429; Kirkpatrick *v.* McCullough, 3 Hum., 171; Whitman *v.* Childress, 6 Hum., 303; Wolfe *v.* Tyler, 1 Heis., 313; Lawrence *v.* Dougherty, 5 Yer., 434.

FROM JACKSON.

Appeal from Chancery Court of Jackson County. T. J. FISHER, Ch.

G. B. MURRAY and J. T. ANDERSON for Anderson.

J. H. MCMILLIN for Gore.

MCALISTER, J. The question presented upon this record is whether William Gore is liable to J. T. Anderson for the amount of a judgment assigned by the former to the latter. The defense interposed by Gore is that, at the time he assigned the judgment to Anderson, it was expressly stipulated and agreed that it should be without recourse.

The facts briefly are, viz.: That William Gore, as an heir of M. Gore, deceased, was interested with others in the latter's estate. In March, 1892,

one M. L. Gore filed a bill in the Chancery Court of Jackson County against William Gore and the other heirs of M. Gore, seeking to recover compensation for services rendered in looking after their interests in the estate. In that proceeding it was adjudged that M. L. Gore was not entitled to compensation, but was indebted to the heirs of M. Gore for moneys collected by him. It was decreed that M. L. Gore was indebted to William Gore, among others, in the sum of $369. M. L. Gore appealed from that decree to this Court. This Court reversed the decree of the Chancellor, and held that M. L. Gore was entitled to compensation from said heirs. It was decreed that M. L. Gore was entitled to hold all funds in his hands belonging to the heirs, and amounting to about $2,000, as compensation for his services as agent. This decree, of course, annulled the decree in favor of William Gore against M. L. Gore for $369, and which had been assigned by William Gore to Anderson. The assignment was made immediately after the decree was rendered against M. L. Gore by the Chancery Court of Jackson County. Anderson paid William Gore $240 in cash for the decree and gave him credit for a fee of $50. When this Court reversed that decree and held that M. L. Gore was not indebted to the heirs, but they were indebted to him, Anderson filed a petition in the cause, seeking a satisfaction of his decree out of any funds in the Court arising from the estate of M. Gore and due

William Gore. William Gore, the assignor of the decree, resisted the relief sought in the petition of Anderson, upon the ground that when the decree was assigned it was distinctly agreed that Anderson should take the claim at his own risk, and that Gore was not in any event to be liable to Anderson for any sum in connection with, or growing out of, his transfer of the decree.

The assignment of a chose in action, such as a bond or judgment, does not imply a warranty that it will be paid, and the assignor will not be liable to the assignee, on default of the debtor, unless he has rendered himself liable by an express contract or has been guilty of fraud. 2 Am. & Eng. Enc. Law, 1091; *Mohler's Appeal*, 5 Pa. St., 418 (S. C., 47 Am. Dec., 413); *Jackson* v. *Crawford*, 12 S. & R. (Pa.), 165; 14 S. & R. (Pa.), 290.

The assignor of a judgment is not liable to refund the consideration paid, upon the insolvency of the obligor, unless he has expressly agreed to do so. *Robinson* v. *White*, 4 Litt. (Ky.), 237; *Anderson* v. *Bradford*, 5 J. J. Marsh. (Ky.), 69. Where a judgment was assigned with an understanding that, when obtained, it was to be collected at the risk and expense of the assignee, and he failed to recover, it was held there was no breach of the agreement, or failure of consideration, so as to entitle the assignee to recover from the assignor. *Underwood* v. *Morgan*, 11 Johnson (N. Y.), 425.

So in our State, the indorser of a paper not

negotiable by the law merchant is not liable to the holder, except when he specially contracts to be so, or for fraud in the transfer. The effect of the assignment of unnegotiable paper is to divest the legal property or interest out of the holder and vest it in the assignee. *Simpson* v. *Moulden*, 3 Cold., 429; *Kirkpatrick* v. *McCullough*, 3 Hum., 171; *Whitman* v. *Childress*, 6 Hum., 303; *Wolfe* v. *Tyler*, 1 Heis., 313; *Lawrence* v. *Dougherty*, 5 Yer., 434.

In the case now being adjudged, the Court of Chancery Appeals find that Anderson purchased this decree from William Gore at a discount of twenty per cent., and took a transfer of it, agreeing that William Gore was in no event to be in any way liable on his assignment. So that, independent of the general rule of law on this subject, the finding of the Court of Chancery Appeals is conclusive against the right of Anderson to subject money due Gore to the payment of this claim, or in any way to hold him liable. It is wholly immaterial that William Gore may have received the benefit of this decree in the payment of his pro rata of the compensation due M. L. Gore for services rendered the heirs of M. Gore. As stated by the Court of Chancery Appeals, Anderson purchased the decree, agreeing to run the risk, or, rather, take the chances that M. L. Gore would have to pay it, instead of having it appropriated in payment of his compensation.

Affirmed.

GRIBBLE *v.* WILSON.

(*Nashville.* January 11, 1899.)

1. CONSTITUTIONAL LAW. *Right of trial by jury.*

That clause of § 5841 of Shannon's Code which directs that the "additional costs" of a special jury in a civil case shall be taxed to the losing party is invalid, as an unwarranted invasion of the right of trial by jury, as defined and preserved by the State and Federal Constitutions. The remainder of the section is valid. (*Post, pp. 613–619.*)

Constitution construed: Art. I., Sec. 6; U. S. Const., VII. Amendment.

Code construed: § 5841 (S.); § 4805 (M. & V.); § 4029 (T. & S.).

Cases cited: McDaniel *v.* Railroad, 88 Tenn., 542; Clingan *v.* Railroad, 2 Lea, 726; Jackson *v.* Pool, 91 Tenn., 452; Hannum *v.* State, 90 Tenn., 649; Mayor *v.* Shepherd, 3 Bax., 373; Dunn *v.* Railroad, 3 Bax., 415; Neely *v.* State, 4 Bax., 174; Henley *v.* State, 98 Tenn., 702–704.

2. SAME. *Constitutionality of statutes considered only when raised.*

This Court does not seek out constitutional defects in statutes, but indulges a strong presumption in favor of their constitutionality and validity. Such questions are not considered unless raised and presented, and hence the fact that the Court may have construed and enforced a statute, whose constitutionality had not been questioned, is not conclusive of its validity, and does not preclude inquiry as to its constitutionality when that question is properly raised. (*Post, pp. 616, 617.*)

FROM DEKALB.

Appeal in error from Circuit Court of DeKalb County. W. D. SMALLMAN, J.

Gribble *v.* Wilson.

WEBB, CANTRELL & FOSTER for Gribble.

WADE & ROBINSON and D. O. WILLIAMS for Wilson.

WILKES, J. This is a motion to retax costs in a suit for slander. On motion of defendant, a special jury was ordered summoned and impaneled to try the suit. Persons were designated by the trial Judge, from whom the jury was selected. The plaintiff, upon trial, was the losing party and by order of the Court the costs were taxed to him. He now moves to retax this cost so as to relieve him of so much as was incurred at and about the summoning, impaneling, and serving of the special jury; in short, all costs incurred on account of the special jury, which was taxed to him by the Clerk, under § 5841 (Shannon Code). The Court below denied the motion and refused to retax the cost or relieve the plaintiff therefrom, and he has appealed to this Court and assigned this refusal of the trial Judge as error.

The Act of 1843–44, Ch. 134, Sec. 4, brought into the Code of 1858 as § 4029, and into the compilation of Milliken & Vertrees as § 4805, and into the Shannon Code as § 5841, provides: "On motion of either party in any civil action, a special jury may be ordered and summoned, if, in the opinion of the Court, it is proper, the additional cost to be taxed to the losing party."

The sole and only contention made in this Court

is, that so much of this Act as prescribes that the "additional cost [of the special jury] shall be taxed to the losing party," is unconstitutional. The argument is that it is in violation of Sec. 6, Art. 1, of the Constitution of Tennessee, which provides that "the right of trial by jury shall remain inviolate," etc. This is the language also of the Constitution of 1796, Art. 11, Sec. 6, and of the Constitution of 1834, Art. 1, Sec. 6. It is also claimed to be violative of Art. 7 of the Amendments to the Constitution of the United States, which provides: "In suits at common law, when the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

It will be noted that the provisions in both the State and Federal Constitutions refer to a condition then existing as to trial by jury. The provision of the United States Constitution is that the right shall be "preserved," and in the State Constitution that it shall "remain" inviolate.

It has been held that the force of these expressions is that the right of trial by jury shall remain "inviolate," or be "preserved," as it existed at common law at the time of the adoption of the Constitution. This right of trial as it existed at common law has been declared to be the glory of England, and the common law was no less zealous

to provide for the impartiality of the juror than to uphold the right to the jury in civil as well as criminal cases. 6 Am. & Eng. Enc. Law (2d Ed.), 991.

It is a cardinal principle in the common law, as well as under these constitutional provisions, that juries must be disinterested and impartial, as much so as the Judges who preside at the trial, and various statutory provisions are directed to this end and to the selection of only good and lawful men, and so environing them as to keep them free from any and all influences tending to render them interested or partial in the determination of any case.

The constitutionality of this particular Act and portion of the Act in controversy has never been brought in question in this State. The Act itself has been passed upon time and again, and construed and applied without any question being raised as to its constitutionality. Thus it has been held that the trial Judge had no power to appoint a special jury, upon his own motion, over the objection of a party, while the entire regular panel is in attendance and free from duty and exception. *McDaniel* v. *Railway Co.*, 4 Pickle, 542. It has also been held that, on motion of either party, though the other opposes it, the Court may, in its discretion, order a special jury to be summoned, and designate the names of the persons to be summoned, and the reason for summoning such special jury need not appear. *Clingan* v. *Railroad*, 2 Lea,

726; *McDaniel* v. *Railway*, 4 Pickle, 545; *Jackson* v. *Pool*, 7 Pickle, 452; *Hannum* v. *State*, 6 Pickle, 649; *Mayer* v. *Shepherd*, 3 Bax., 373. It has likewise been held that, under the statute, the entire costs of the special jury should be taxed to the losing party, though the regular panel be discharged, and not in attendance and not on pay; and this means, not only cost of summoning by the Sheriff, but the compensation of the jury. *Dunn* v. *N. & C. R. R. Co.*, 3 Bax. 415.

In none of these cases, however, was the constitutionality of the Act raised or considered. And this fact is insisted upon, both for and against the contention now made. On the one hand, it is said that, the question never having been raised, the mere fact that the Act has been passed upon and construed, and even enforced, cannot be conclusive as to its constitutionality, and, on the other hand, it is insisted that the fact that the question has not been made, and the Court has passed upon and enforced the Act, is conclusive that it is constitutional. It is not the province or practice of this Court to seek out constitutional defects in the Acts of the General Assembly. Indeed, all intendments are in favor of the laws as passed, and the Court will only pass upon their validity when it is raised and fully presented to the Court. *Henley* v. *State*, 14 Pickle, 682. The fact, therefore, that an Act has been construed and enforced and passed upon by this Court is not conclusive of its validity

and constitutionality, and this question may be raised at any time when the facts and pleadings justify its consideration.

The specific objection is to that portion of the Act which provides that "the losing party shall pay the additional costs of the special jury." There is no other special provision made for the payment of such jury, and the argument is that the compensation of the jury must, if the Act is enforced, depend entirely upon the result of the trial, and thus a strong inducement is held out to the jury to find against the party who is most able to pay the costs, and not against the one who may be unable to pay.

We think the principle involved in this case is the same as that considered in the case of *Neely* v. *State*, 4 Bax., 174. That was a case testing the constitutionality of Ch. 7, Acts of 1875, entitled, "An Act to tax the losing party with the jury fees in all cases in civil suits, and to repeal §§ 4036 and 4037 of the Code." By that Act the costs of the jury were directed to be taxed and collected as all other costs, provided the county should continue to pay, in the same manner then provided by law, the said fees on all suits *in forma pauperis*, and the third Section provided that the trial Judge should apportion the fees of the jurors in proportion to the time consumed in the trial of the same, provided the county should not be taxed with any part thereof. In speaking of the

practical working of that Act, this Court said: "If one of the parties to the suit is solvent, and the other insolvent, the jurors get no fees for their services unless they decide the case against the solvent party, except in cases where the plaintiff sues as a pauper, and then the county pays the fees of jurors as by the former law." The Court was of opinion that such a condition was calculated to influence and bias a jury in its deliberations, and it was said that "it is not necessary to assume that jurors so situated would ordinarily be influenced in their verdicts by the consideration of saving their fees. The question is, whether jurors subjected, by the terms of the law, to such temptation are the good and lawful men, free from bias and interest in the result, whom parties have a right to sit upon the trial of their causes."

Any interest which a juror may have, however inconsiderable, disqualifies him from sitting on a trial, both at common law and by statute. The reasoning of the Court in the Neely case is applicable and conclusive in this. The Court declared that act invalid because of this feature, and, as the legitimate effect, restored §§ 4036 and 4037 of the Code, which had been repealed by that act and which provided for payment of juries by the county. In the case of *Henley* v. *The State*, 14 Pickle, 702–704, stress was laid upon the fact that under the provisions of the Jarvis law, which denied witnesses' and officers' fees in certain criminal cases

altogether, and in others only when conviction was had, provision was left, as before, for the payment of jury costs by the county, and they were not dependent in any way on the result of the suit.

We are of opinion that so much of the Act as prescribes the manner in which the cost of the jury shall be taxed and collected is in violation of the constitutional and common law right to a trial by jury of impartial and disinterested men. This portion of the Act may, however, be eliminated, leaving still in the trial Judge the power, in proper cases and on proper motion, to appoint a special jury and designate them by name for summons.

The judgment of the lower Court is reversed, and the costs will be retaxed as herein indicated, so as to relieve the losing party therefrom.

The cost of this application to retax will be paid by the defendant, Wilson.

GORE *v.* GORE.

(*Nashville.* January 11, 1899.)

RES ADJUDICATA. *Does not exist, when.*

A judgment, adverse to complainant, in one action to recover land is not *res adjudicata* that precludes another action for the same land against the same parties based upon another title, subsequently acquired and not involved in the first suit.

Cases cited: McKissick *v.* McKissick, 6 Hum., 75; 24 N. H., 131; 36 Cal., 230; 102 Ill., 115.

FROM JACKSON.

Appeal from Chancery Court of Jackson County. T. J. FISHER, Ch.

HAILE & JOHNSON for Mary C. Gore.

J. M. MORGAN, M. G. BUTLER, G. H. MORGAN, and G. B. MURRAY for M. L. Gore.

BEARD, J. The bill in this cause, involving a controversy as to the title of a tract of land in Overton County, was dismissed on the ground of *res judicata*, raised by demurrer. The averments of the bill, so far as they affect this defense, are that the complainant, Mary C. Gore, then Mary C. Max-

well, filed her bill in the Chancery Court of that county against the defendants, in which she claimed to be the owner in fee of this land, as purchaser at a sale made under a decree entered by that Court in the case to which the widow and heirs and devisees of one Henry C. Maxwell, deceased, who was alleged to be its owner at the time of his death, were all parties, and that this purchase was confirmed to her by the Court, and all the title of the heirs and devisees of said decedent were divested out of them and invested in her; that, notwithstanding she was thus the owner of this property, yet the defendants had entered upon it, claiming title as heirs of the deceased vendor of Henry C. Maxwell; and that the Chancery Court was asked in that bill to establish and protect the title so acquired by her, for an injunction to stay waste, and for a personal decree for the value of the timber that the defendants had taken or caused to be taken from the land.

The bill further avers that, after answer was filed in that cause, proof was taken and the case was tried, when a decree was entered by the Chancellor, in which it was adjudged that complainant, Mary C. Gore, acquired no title to this land by virtue of the decree for sale and purchase thereunder, heretofore referred to; that the proceedings in that cause were so imperfect "that they failed to divest the title out of the heirs of said Maxwell and to vest it in" the purchaser; and that, upon

appeal to this Court, this decree was affirmed, and the cause was remanded for an account and to ascertain damages.

The bill avers that, since this decree of affirmance, and while that case was pending in the Court below, on procedendo from this Court, complainant, Mary C. Gore, has obtained deed from all the heirs of J. S. Maxwell, deceased, and that, by virtue of these deeds, she is now the owner in fee of the land in question, and the present bill is filed to have established this title. The question then presented is, is she precluded from setting up this after-acquired title by the result of the former litigation? If so, then we will have this anomalous condition: that complainant was defeated in the former suit because she had no title, and is to be defeated now, by reason of the decree in that cause, when she presents, upon the averments of her bill, admitted to be true by demurrer, a paramount legal title, acquired by her since the termination of that cause.

We are aware of no case that would stand as authority for such a result. On the contrary, the rule is that a party will not be prejudiced by a judgment as to rights not then accrued. In the language of Mr. Freeman, in Vol. 1, Sec. 329, of his work on Judgments, "Under no circumstances will a judgment or decree take effect upon rights not then existing. If an action is brought to recover possession of real or personal property, the judgment

therein cannot estop either of the parties from asserting title subsequently acquired." So, if "a decree be entered quieting title and enjoining the defendant from making any further contest against the plaintiff's title, this general language will be confined to rights in issue, and will not prevent the defendant from asserting a subsequently acquired title." *Jones* v. *Pitaluma*, 36 Cal., 230.

In *Woodbridge* v. *Bamming*, 14 Ohio St., 328, it was held that a devisee was not estopped by a former decree in a partition proceeding to which he was a party defendant, as heir, from setting up title as devisee under a will of the testator, which was revoked, but was afterward restored and admitted to probate, while in *Hanley* v. *Simmons*, 102 Ill., 115, it was ruled that a party who fails in an action of ejectment because he has only an equitable title, will not be precluded from a recovery when, having subsequently acquired the legal title to the property, he brings an action of ejectment against the same party for it.

In *Barrows* v. *Kindred*, 4 Wall., 399, ejectment was brought to recover land, the title to which was clearly deraigned by the plaintiff from a grant to a remote owner down to a deed to himself from the executor of the immediately preceding owner. This title was confessedly perfect, but the defendant resisted recovery by introducing a former record of an ejectment suit instituted by the same plaintiff against the privy in estate of the defendant, in

which plaintiff was defeated. This record disclosed, however, that plaintiff in the former suit rested on a deed executed by an attorney in fact acting under a power which the executor undertook to execute for that purpose, and the plaintiff was defeated because this power and the deed under it were void. Subsequently he obtained a deed direct from the executor, and upon it instituted the last suit. On this state of facts the Court said: "Barrows had no title to the premises in controversy, and judgment was given against him . . . But this did not deprive Barrows of the right to acquire a new and distinct title, and, having done so, he had the same right to assert it, without prejudice from the former suit, which would have accompanied the title into the hands of a stranger. At the termination of that suit the executors had not passed the title to any one. They did not transfer it for more than a year afterwards." And it is immaterial that the two suits are between the same parties and for the same property if the title set up in the last suit did not exist in the plaintiff at the time of the former litigation, and was not, therefore, adjudicated in it, but was acquired by him subsequently thereto. *McKissick* v. *McKissick*, 6 Hum., 75; *Brown* v. *Roberts*, 24 N. H., 131.

It follows that the decree of the Court of Chancery Appeals must be reversed and the case will be remanded for an answer.

GEORGE *v.* BELK.

(*Nashville.* January 25, 1899.)

1. VERDICT. *Power and duty of Court and jury to secure a lawful verdict.*

The Court has the power, and it is his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form. And the jury may, at any time before their discharge, amend their verdict, under direction of the Court, so as to conform to the law. (*Post, pp. 626, 627.*)

Cases cited: 123 Mass., 254; 15 Or., 200; 52 N. Y., 437; 84 Iowa, 50; 107 Pa. St., 348; 6 John., 68; 7 John., 32; 22 Maine, 453; 28 Neb., 141.

2. SAME. *Case in judgment.*

The jury in a malicious prosecution case returned a verdict that plaintiff recover one dollar and that defendant pay all costs. The Court informed them that this verdict would not carry costs against defendant. The jury then retired and amended their verdict and gave judgment for six dollars. The Court disregarded the last verdict and rendered judgment upon the first.

Held: Error. Judgment should have been rendered on the amended verdict. (*Post, pp. 626, 627.*)

FROM WILSON.

Appeal in error from Circuit Court of Wilson County. W. C. HOUSTON, J.

George *v.* Belk.

N. G. ROBERTSON and CANTRELL & MCMILLAN for George.

SANDERS & FAULKNER for Belk.

BEARD, J. This is an action for malicious prosecution, in which two trials occurred and a large bill of costs was accumulated in the Court below. On the last trial the jury came into Court and reported a verdict in this form, viz.: "We find that defendant should pay all the costs and that the plaintiff recover one dollar." Upon the suggestion of counsel for the plaintiff, that the jury were evidently laboring under a misapprehension on the subject of costs, and that it would be well for the Court to instruct them, the Court then said, in substance, "You have nothing to do with the matter of costs, but a verdict in such a case as the present for five dollars or less will not fix the costs on the defendant." The jury then retired, and after a short time returned and reported a verdict in favor of plaintiff for six dollars. This was received by the Court, and the jury was then discharged. Subsequently, on motion of the defendant's counsel, this last verdict was rejected by the Court and a judgment was entered on the first verdict in favor of the plaintiff, eliminating therefrom, however, as surplusage, so much of it as fixed costs on defendant.

This action of the trial Judge was erroneous. The authorities are numerous to the effect that a jury may amend or change their verdict at any time

before they have been discharged, or, if they bring in an informal or insufficient verdict, the Court may send them back to the jury room with directions to amend it and put it in proper form. 2 Ell. Gen. Pr., Sec. 947; *Brown* v. *Dean*, 123 Mass., 254; *Nickelson* v. *Smith*, 15 Or., 200; *Warren* v. *N. Y. Cent. R. R.*, 52 N. Y., 437; *Johnson* v. *Rider*, 84 Iowa, 50; *Smith* v. *Meldron*, 107 Pa. St., 348; *Root* v. *Sherwood*, 6 John., 68; *Blackley* v. *Sheldon*, 7 John., 32; *Gardnin* v. *Appleton*, 22 Maine, 453; *Rogers* v. *Sample*, 28 Neb., 141.

Even if it be conceded that the Court, in the beginning, might have disregarded so much of the first verdict as awarded costs against the defendant as surplusage and entered judgment on the balance, still this is immaterial, as that course was not pursued. On the other hand, the wiser course was taken, seeing the evident purpose of the jury, of sending them out, with an opportunity to form a legal verdict which would effectuate this purpose. The error of the trial Judge was in not rendering judgment on this last verdict. A judgment will be entered here, such as should have been in the Court below; that is, in favor of the plaintiff for six dollars, and for the costs of the Court below and all those accruing from this appeal.

INSURANCE COS. *v.* SCALES.

(*Nashville.* January 14, 1899.)

1. SUPREME COURT. *Will not reverse for admission of evidence, when.*

This Court will not reverse on account of the admission of hearsay or secondary evidence where there was no exception or ruling in the lower Court, otherwise than by that Court's refusal to give in charge a request upon the subject. (*Post, pp. 632, 633, 640.*)

2. SAME. *Will not reverse for exclusion of witness' answers, when.*

This Court will not reverse on account of the lower Court's exclusion of a witness' answers to pertinent questions, when the record fails to show any exception to the Court's ruling, or the answers that the witness would have made, or that such answers would have been material. (*Post, pp. 632, 633.*)

3. CHARGE OF COURT. *Refusal of request proper, when.*

It is not error for the Court to refuse to charge, by special request, that the jury should not consider the statements of certain witnesses because they were hearsay, where the statements were admitted without exception and no request was made for their withdrawal. (*Post, pp. 632, 633.*)

4. SAME. *Requisites of assignments of error as to evidence.*

Assignments of error relating to erroneous admission or exclusion of evidence must be specific and point out the pages of the transcript where the evidence, exceptions thereto, and rulings thereon, may be found. (*Post, p. 634.*)

5. FIRE INSURANCE. "*Legal representatives of the assured*" *defined.*

Under a fire policy providing that the term "insured," when used therein, shall mean and include "legal representatives of the assured," a mere agent, *e. g.*, the husband of the assured, is not included, but only those persons bearing the relation to him of assignee, executor, administrator or heir. (*Post, p. 635.*)

Case cited: 102 Mich., 334.

6. SAME. *Fraudulent and false proofs of loss do not avoid policy, when.*

A fire policy upon property of a married woman, which, by its terms, is forfeited by the fraud or false swearing of the insured, or his "legal representatives," occurring either before or after loss, is not avoided by the fact that wrongful and fictitious items were included in the proofs of loss by the fraud of the husband, without the knowledge or participation of the wife, the former having, as agent of the wife, attended to her business, and she having, without actual knowledge of the facts, relied upon information from him without further investigation, and both having joined in the verification of the proofs of loss. (*Post, pp. 634–639.*)

7. SAME. *False swearing that avoids a policy.*

Under a policy that provides for forfeiture for fraud or false swearing of the assured, the statements that will avoid it, if made by the assured, must be willfully false in some material matter and made with intent to deceive the insurer, and if the false statements are made by an agent of the assured, the latter must have known of or acquiesced in their falsity. (*Post, p. 638.*)

Case cited: Insurance Co. *v.* Munday, 5 Cold., 547.

8. SAME. *Fraud or falsehood in proofs of loss.*

A policy will not be avoided so readily upon a charge of fraud, or false swearing, in proofs of loss as upon a like charge of fraud or false swearing in the application. (*Post, p. 639.*)

9. SAME. *Contractual limitation of action not effective, when.*

The provision in an insurance policy that no action shall be brought thereon after the expiration of six months from the date of the fire, does not operate to bar an action brought more than six months after the fire, where the policy likewise contained provisions that no action should be brought within sixty days after the fire and until arbitration had been attempted and had failed, and the action was brought within six months after expiration of the sixty days and within six months after failure of arbitration. (*Post, pp. 640–642.*)

10. SAME. *Contractual limitation begins to run, when.*

The contractual limitation of action found in an insurance policy, though expressed, in terms, as a certain period "after the fire," or "after the loss," does not become effective or begin

to run until the right of the assured to sue has accrued under the other provisions of the policy. (*Post*, *pp. 641, 642.*)

11. SAME. *Contractual limitation must be set up by plea.*

The contractual limitation of action found in a policy of insurance must be set up by plea, unless it can and has been raised by demurrer. (*Post*, *p. 641.*)

12. BILL OF EXCEPTIONS. "*Proof closed.*"

The statement "proof closed" is not the equivalent, in a bill of exceptions, of the expression that "this is all the evidence." (*Post*, *p. 642.*)

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. JOHN W. CHILDRESS, J.

PILLOW & TYNE for Insurance Cos.

J. S. PILCHER and J. C. BRADFORD for Scales.

WILKES, J. This consolidated record embraces four separate actions against different fire insurance companies, but, as they involve substantially the same questions, they have been tried together.

Mrs. Grace C. Scales and Medora Waller, partners, are the parties insured, and the subject is a stock of goods, wheeled vehicles, etc., contained in a house on Cherry street, Nashville, Tenn. There was a trial before the Court and a jury in the Court below, and a verdict and judgment against the insurance companies, and they have appealed to this Court and assigned errors. The title to the property insured was in Mrs. Scales and Mrs. Wal-

ler, as partners, and the business was carried on in their names, but by their husbands, and principally by Mr. Waller. The ladies took no active part in the business, and knew personally but little of its operations. The policies were taken out by the husbands—two of them in the names of the ladies, and the other two in the firm name of Scales & Waller, and no question is made but that this meant the firm composed of the two ladies. No question is made in the record as to the title to the property being in the married women, as partners, or that the insurable interest was in them, but stress is laid upon the fact that the business was wholly managed by the husbands, as explaining other matters appearing in the record.

The fire occurred on the 27th of June, 1897. On the 15th of July thereafter there was an agreement to arbitrate, which was only partially executed, and no award was made. Afterwards proofs of loss were filed with the company. These were prepared by the husbands, and, it appears, principally by Scales, and were sworn to by both husbands and wives. These proofs purport to contain itemized schedules of the property damaged and destroyed, and are sworn to as correct by the married women, and separately by the husbands, to the best of their knowledge, information, and belief, in each affidavit. After examining these proofs, the companies, on the 14th of September, 1897, notified the assured and their husbands that they denied all liability on the

policies, and declined to pay the same or any part thereof. The suits were brought on the 8th of January, 1898. Many errors are assigned.

It is insisted that the Court erred in overruling the objection of the companies to the evidence of D. C. Scales and W. H. Allen as to the character, value, and quantity of goods damaged and destroyed. The specific objection made in this Court to this evidence is that it is based largely, if not entirely, upon an itemized statement made out by other parties, principally R. W. Waller, and hence it was hearsay and secondary evidence, and showed on its face that it was not the best evidence obtainable.

We are precluded from passing upon this assignment upon its merits, as we fail to find from the record that any proper exception was made and acted upon in the Court below. We are not cited in the assignment to any page of the transcript where such exception may be found, and it is asserted by opposing counsel that no such exception appears, and we have been able to find none. It is said that the attention of the Court was called to the fact that the evidence offered was not the best that could be obtained, and he was requested to charge upon this feature of the case that the evidence must, therefore, be rejected. But the question cannot be raised in the charge only, and no objection having been made to the evidence when offered, it must stand as not excepted to.

In the reply to appellee's brief, it is said a

proper exception to the evidence of D. C. Scales is found on page 76 of the transcript. Upon examining this we find that defendant's counsel did attempt to object to Scales' statement, and was proceeding to state his objection when witness interrupted with an explanation. The objection was not renewed, and was never completed and never acted on by the Court, and hence cannot be considered in this Court.

It is said the Court erred in refusing to allow counsel for the insurance companies to ask Mr. Waller to explain the difference in items contained in the proofs of loss made to the adjusters, and other statements afterward made. No exception appears to have been taken to this refusal and ruling of the Court at the time, and it does not appear what the witness would have stated, or that the explanation was within his knowledge or material to the issues involved, and we are precluded from considering it. In the reply brief it is said that a proper exception will be found on page 185, but we find that the exception on page 185 was not to any statements made by Mr. Waller to, but statements made by, Mr. Wrightman and about a distinctly separate matter, which the Court thought was not pertinent.

It is objected that the Court refused to let counsel for the companies ask W. R. Waller whether he obtained some blank billheads from Carpenter Bros. It does not appear what the witness would have stated in response to the question, so that this objection is not in shape for our consideration.

None of these assignments comply with the rule. None of the exceptions were properly made. An exception to evidence must be made when it is offered, and the ground of exception must be specifically pointed out. It must appear that the Court adversely acted upon the exception, and, if it is to the rejection of testimony, it must appear, from the record, what the witness would have stated, if allowed to answer, in order that this Court may see that it is material. The assignment of errors must always point out the page of the transcript where such exceptions and the evidence excepted to may be found. We may add, however, that we think these exceptions could not be sustained if properly made.

The fourth, fifth, and sixth assignments may be considered together. It is said that the Court erred in charging the jury that, if there were any fraudulent and wrongful items embraced in the proofs of loss, it must be shown that they were included with the knowledge and by the consent of the ladies insured, and that the fraudulent acts and intent of R. W. Waller, as their agent, could not defeat their right of recovery, unless they knew of the fraud or ratified it after it came to their knowledge; and that the Court should have charged the jury that, if Mrs. Scales and Mrs. Waller adopted any false statements made by their agents, without investigating the facts, they thereby became guilty of fraud themselves, and the jury should find against them;

and that, if they made representations as to knowing the facts, when they had no knowledge, and the representations proved to be untrue, that would be fraud within the provisions of the policy, and would defeat any recovery.

These assignments present the merits of the controversy. As bearing upon them, it is insisted that the terms of the policy are important. It is provided in the policy that, in case of any fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, either before or after the loss, the policy shall be voided; and, again, the policy provides that, whenever, in this policy, the term "insured" is found, it will be held to include the legal representatives of the assured. We are of opinion that the contention of appellants derives no strength from the use of the term, "legal representative of the assured." Used in this connection and in regard to the subject-matter, this term means parties beneficially interested by law or contract in the policy, such as an assignee, or the executors, administrators, and heirs of the assured, and not to persons who are merely agents of the insured. *Metzger* v. *Manchester Fire Ins. Co.*, 102 Mich., 334.

The brief filed with the assignment of errors states that the insurance companies repeatedly introduced proof showing fraud and false swearing on the part of Waller, the agent of the insured, which the Court excluded on the ground that his false

swearing was not material, and that the Court instructed the jury not to consider the same in making up their verdict, unless it was shown that assured knew of the false swearing. The appellants have given no references to the record where such evidence was offered and objected to and excluded, so that we can only treat such matters as the appellees have pointed out, and such as we have been able to find in the record, which we have done without conforming to the rule. As touching on this general question, it appears that the preliminary proofs were made out by the husbands, Scales and Waller; they were accepted and adopted, without investigation, by the insured, and were sworn to, without actual knowledge on their part, and they were thus rendered to the companies. The argument is, that an active duty devolved upon the insured to examine the statements and satisfy themselves of their truth. The appellants have introduced, in a very able brief, quite a number of authorities to support their contention that actual knowledge of fraud need not be shown. The case most nearly in point is *Mullen* v. *Vermont Mut. Ins. Co.*, 58 Ver., 113. It was a case where the loss was of household goods, and the husband left to the wife the duty of making out the list, and swore to it without examination, and without knowing whether it was correct or not. The inventory contained many false statements, calculated and intended to work fraud, and it was held that the insured husband

thus made the fraud of the wife his own, and that it was improper to rest liability on the intention and knowledge of the husband. This is a strong case, and goes, as we think, to the very verge of the law, if it is not, indeed, contrary to the current of authority. The facts in that case are, however, different from those in the present case in several very important features. In that case it is said that the representations must be true in fact. If this is intended as an absolute requirement, it is clearly out of line, for it leaves no room for honest mistakes or innocent want of knowledge. Such a rule might apply when the statements are made in the application upon the idea that they form the basis of the contract, and, if acted on, one of two innocent parties must suffer, and, in such case, he must suffer who has caused the error. But such a rule, when invoked to cause a forfeiture, would be contrary to reason and authority. The case was one of either gross fraud or reckless negligence on the part of the husband, in leaving the whole matter to his wife, and indorsing her inventory without examination. Here the business was in the hands of the husbands, and they were familiar with it, and the wives were not. The wives could only get the information through their husbands, who gave them assurances of good faith by themselves swearing to the statements. In accord with appellants' view of the case, we are cited to some other authorities: *Leech* v. *Ins. Co.*, 58 N. H., 246; 1 Bid-

dle on Insurance, Sec. 446; *Knop* v. *National Ins. Co.*, 65 N. W. R., 228.

It appears that much depends upon the facts of each case, and when there is from the record very strong evidence of negligence it will be taken as presumptive evidence of fraud, and in a number of cases the rule has been applied as contended for by appellant's counsel, with more or less of strictness. We are of opinion, however, that the weight of authority is that statements must be willfully false in some material matter, and made with intent to deceive the insurer, in order that they shall have the effect to defeat the policy, and if this is true as regards the false swearing of the assured, it is true when applied to the false swearing of an agent when the falsity is not known to or acquiesced in by the assured. Joyce on Insurance, Sec. 3339; *Phœnix Ins. Co.* v. *Munday*, 5 Cold., 547; *Phœnix Ins. Co.* v. *Swan*, 41 S. W. Rep., 519; *Lion Ins. Co.* v. *Stan*, 12 S. W. Rep., 42; *Runkle* v. *Hartford Ins. Co.*, 68 N. W. Rep., 712; 99 Iowa, 414; *Tubb* v. *Ins. Co.*, 84 Mich., 646; *Maion* v. *Ins. Co.*, 35 Mo., 148; *Williams* v. *Phœnix Ins. Co.*, 61 Md., 67; *Merrill* v. *Ins. Co.*, 23 Fed. Rep., 247; Beach on Insurance, Secs. 808–809; May on Insurance, Sec. 477. The case of *Metzger* v. *Manchester Fire Ins. Co.*, 102 Mich., 334; 63 (N. W. Rep., 650), is a case almost identical in its facts, and in the provisions of the policy sued on, with this case. There the fraud of the husband was

gross and glaring, but the Court held that the wife could not be affected by it inasmuch as she was innocent of the fraud. That case also intimates a distinction between cases of false swearing in the application for insurance and false swearing in the proofs of loss after it happens. And there must, from the nature of things, be a difference between the cases, even though the policy provide that false swearing, either before or after the loss, shall vitiate the policy.

When the false swearing is in the application it forms the basis upon which the contract rests, and if fraud enters into it the policy would be voided even though the policy does not so provide. But after the loss occurs then voiding the policy is in the nature of a penalty or forfeiture; in other words, in such cases the holding is virtually that, although the insured has had a loss, and may be entitled to recover from it, yet, as he has been guilty of fraud in the proofs, he must have his policy vacated and set aside as a punishment for such fraud, or attempted fraud. In the latter case, as in all cases of forfeiture, a strict construction should be adopted, and the forfeiture not enforced except on the plainest grounds, if at all. Without going into detail, we state that we have been able to find no such evidence of false swearing and fraud as appellant insists upon, and he has not cited us to the pages of the transcript where it may be found.

It is said the Court erred in not stating to the jury that they should not consider the statements of witnesses made upon information as to loss, and value and quantity of goods. It was not error to decline to give this charge, inasmuch as the evidence had been heard without valid objection, and was, therefore, permissibly and properly before the jury.

It is said the Court erred in not charging that the plaintiff must prove to the satisfaction of the jury that the goods were destroyed, otherwise they could not recover. This request is not strictly correct, inasmuch as it leaves out of view damage to goods not destroyed. The Court correctly instructed the jury on this point. The real point of this objection is that the Court did not tell the jury to disregard the testimony of witnesses who, it was claimed, made their statements from hearsay, and this feature of the case has already been disposed of.

One of the policies provided that no action should be brought after the expiration of six months from date of the fire. The fire occurred June 27, 1897, and the action was commenced January 8, 1898, or about six months and eleven days after the fire. The Court below held that this was a valid provision, but that the limitation was suspended during the period consumed in the attempt to arbitrate. The time consumed in this attempt does not appear further than that suit was delayed four months after the absolute refusal of the companies to pay.

It appears that this contract limitation was not set up by plea, and this we think is fatal to it as a defense. Such contract limitation, like the statute of limitations, must be pleaded if intended to be relied on. *Ketchum* v. *Protection Ins. Co.*, 1 Allen (N. B.), 136; *Barbour* v. *Fire & M. Ins. Co.*, 18 W. Va., 658; Bacon Ben. Societies Sec. 447. We do not mean to say it may not be raised by demurrer when the policy is made an exhibit and the terms of the contractual limitation appear. But, in addition to this, the limitation in this case is not a bar to the suit. The limitation of "so many days after the fire" has been construed in a number of cases to mean so many days "after the cause of action accrues." Under the provisions of these policies no suit could be brought until after arbitration and award, and until the failure of such arbitration no cause of action accrued, nor could action be brought under the policies until after sixty days. It might be that such arbitration might pend for the entire limited time, and under a different construction no action could be brought at all. The limitation begins to be effective from the time the right of action accrues, notwithstanding the expression "after the fire." *Case* v. *Ins. Co.*, 83 Colo., 473; *Finzen* v. *Ins. Co.*, 30 Fed. Rep., 352 (27 Pacific Rep., 80); *Owen* v. *Howard Ins. Co.*, 10 S. W. Rep., 117; *Sample* v. *London Ins. Co.*, 24 S. E., Rep., 334; *Vett* v. *Clinton Fire Ins. Co.*, 30 Fed. Rep., 668; *Steen* v. *Niagara Ins. Co.*, 80 N. Y.,

315; *New York* v. *Hamilton Fire Ins. Co.*, 39 N. Y., 45; *Chandlee* v. *St. Paul Ins. Co.*, 21 Minn., 85; *Span* v. *Mutual Ins. Co.*, 17 Fed. Rep., 568; *Hay* v. *Star Fire Ins. Co.*, 77 N. Y., 235; May on Insurance, Sec. 479. In *Steel* v. *Ins. Co.*, 154 U. S., 578, it was held that "after the fire" and "after the loss" were the same thing, and that the limitation of twelve months after the fire must be construed to mean twelve months after the limitation of the sixty days in which payment might be deferred under the terms of the policy and when suit could be brought. Clearly, the time limited by contract in this policy had not expired under this construction of its terms when the suit was brought, and the limitation cannot avail. The amount of loss in these cases is fully shown to have been in excess of the policies, and we can see no reason why it should not be paid. The bill of exceptions fails to state that it contains all the evidence, but instead there is an entry, "Proof closed." This is not the equivalent of the expression that "this is all the evidence," and if there is in the record any paucity of proof it could not avail on this appeal, as the Court will presume there was sufficient evidence to sustain the verdicts.

The judgment of the Court below is affirmed with costs.

GUTHRIE *v.* INDEMNITY ASSOCIATION.

(*Nashville.* January 14, 1899.)

1. INSURANCE. *Contractual limitations valid.*

Contractual limitations of actions upon insurance policies are valid and enforceable. (*Post, pp. 646, 647.*)

Case cited: 74 U. S., 259.

2. SAME. *Contractual limitations not within general statutes of limitations.*

A contractual limitation of action contained in an insurance policy is not within, or extended or controlled by, § 4446 of Shannon's Code, providing for the saving from the bar of the general statutes of limitations of a cause of action upon which suit has been brought within the time limited, but disposed of without decision upon the merits, and a new suit is brought within one year thereafter. (*Post, pp. 648, 649.*)

Code construed: § 4446 (S.); § 3449, (M. & V.); § 2755 (T. & S.).

Cases cited: 74 U. S., 258; 72 N. Y., 499; 78 N. Y., 402; 7 R. I., 301; 94 Pa. St., 345; 128 Pa. St., 386; 130 Pa. St., 170.

3. SAME. *Same.*

A contractual limitation of action contained in an insurance policy is not within or extended or controlled by the statutes suspending the general statutes of limitations during absence of a debtor from the State. (*Post, pp. 652–655.*)

Code construed: § 3458 (S.); § 4455 (M. & V.); § 2762*b* (T. & S).

Cases cited and distinguished: Insurance Co. *v.* Underwood, 12 Heis., 424; 13 Wall., 156.

4. FOREIGN CORPORATION. *Service of process.*

Jurisdiction over a foreign corporation, as to a transaction that had occurred in this State before the withdrawal of the corporation from business in the State, cannot be acquired after its complete withdrawal by the Courts by service of process upon a resident person who had been its local agent at the time of the transaction involved in the suit. (*Post, pp. 649–652.*)

Guthrie *v.* Indemnity Association.

Act construed: Acts 1887, Ch. 226.

Cases cited: Telegraph Co. *v.* Turner, 88 Tenn., 265; Insurance Co. *v.* Spratley, 99 Tenn., 322.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

ESTES & ESTES for Guthrie.

CHAMPION, HEAD & BROWN for Indemnity Association.

McALISTER, J. This suit was instituted in the Circuit Court of Davidson County to collect a policy of life insurance, amounting to $1,000. The policy was issued June 30, 1894, by the Connecticut Indemnity Association, on the life of Allen B. Guthrie, payable to his mother, Adaline Guthrie. The insured executed his note to the company for the sum of $26.27, covering the first year's premium. This note was not paid at maturity, nor has it ever been paid. The insured, Allen B. Guthrie, died on the 1st of January, 1895, and on the 4th of November, 1895, suit was brought to collect the amount of the policy. The summons was served November 27, 1895, on E. B. Craig, insurance commissioner of the State. To this suit the company filed a plea

in abatement, viz.: Defendant, a foreign corporation, had been doing business regularly in the State of Tennessee prior to December 31, 1894, at which date it formally withdrew its agents from the State and ceased to do business therein. It did no business in the State of Tennessee during the year 1895. Defendant had no office, agent, or representative in said State of Tennessee during said year of 1895, nor had it complied with the laws relative to foreign corporations transacting business in Tennessee during that period, nor had it filed with the commissioner of insurance a written instrument, duly signed and sealed, authorizing him to acknowledge service of process for and in its behalf in said State of Tennessee; nor did it consent that service of process, mesne or final, upon such commissioner should be taken and held as valid, as if served upon this company according to the laws of this State, or any other State. Defendant gave no one the right or power to acknowledge service of process for it in the State of Tennessee during the year 1895, or at any other time. The summons in this cause was served upon E. B. Craig, insurance commissioner of Tennessee, November 27, 1895. Said process was not served upon defendant, nor any officer or agent of defendant, nor upon any one authorized to acknowledge service of same in its behalf. This plea in abatement was sustained by the Circuit Judge, and, at the December term, 1896, of this Court, the judgment of the Circuit Court was affirmed and

plaintiff's suit dismissed. Thereafter, on the 18th of May, 1897, the present suit was commenced. The validity of the service of summons is not questioned in the present suit.

This case was tried before the Hon. J. W. Bonner, without the intervention of a jury and upon a stipulation of agreed facts. The defense of the company is rested exclusively upon the seventh condition of the policy, which is as follows: "It is expressly understood and agreed that no action shall be maintained nor recovery had for any claim upon or by virtue of this policy after the lapse of one year from the death of said insured, and if said suit or proceedings for such recovery be not commenced within one year from the date of the death of said insured it shall be deemed a waiver on the part of all parties concerned of all rights or claims under or by virtue of this policy, and as conclusive evidence against the validity of such claim, and this policy shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any money paid thereon."

It is not controverted by the plaintiff that such a contractual limitation contained in a policy of insurance is valid and enforcible. In *Riddlesbarger* v. *Hartford Ins. Co.*, 74 U. S., L. E., 259, the Court, in passing on this question, said, viz.: "The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses, and it is

not an unreasonable term that, in case of a controversy upon a loss, resort shall be had by the assured to the proper tribunal whilst the transaction is recent and the proofs respecting it are accessible. . . . . The validity of the limitations stipulated on conditions similar to the one in the case at bar, has been elaborately considered in the highest Courts of several of the States, and has been sustained in all of them except in the Supreme Court of Indiana. We have no doubt of its validity.

"The rule is that, while the parties to a contract cannot by anything contained therein oust the jurisdiction of the Courts, yet they may lawfully contract to limit the time within which an action upon such contract shall be brought, and the limitation so imposed is binding on the parties." 1 Wood on Limitations, Sec. 42, and authorities cited.

It is insisted, however, by the plaintiff that the suit is not barred by the contractual limitation of one year, but is saved by the original suit which was commenced November 4, 1895. That suit, as already stated, was dismissed in January, 1897, by this Court on defendant's plea in abatement for want of sufficient service of summons. This suit was commenced within one year thereafter, to wit: on May 18, 1897.

Plaintiff's first insistence is that his present suit is protected by § 4446, Shannon's Code, viz.: "If the action is commenced within the time limited,

but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest.''

While it is true the original suit was dismissed for insufficient service of process, and not for any cause concluding plaintiff's right of action, we are of opinion that the statute is wholly inapplicable in the present instance. It clearly refers to statutory, and not to contractual, limitations; for otherwise a statute could be made utterly subversive of contracts executed by parties upon the most deliberate consideration. It was held by the United States Supreme Court, in *Riddlesbarger* v. *Hartford Ins. Co.*, 74 U. S. (L. E.), 258, that "the contractual limitation is not affected by the fact that a previous action, which was dismissed, had been commenced within that period, and that the statute of a State which allows a party who suffers a nonsuit in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in such a case.'' This must be true, for, if the contractual limitation is valid, the parties are not bound by the general limitation of the statute, and, for a like reason, they are not bound by the savings of the statute. The question is purely one of

contract, and is not regulated by the terms of the statute. "The rights of the parties," says Field, J., "flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also." In *Riddlesbarger* v. *Insurance Co.*, 74 U. S. (S. C., 7 Wall.), the Court said: "The action mentioned which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action, from any cause, cannot alter the case. The contract declares that an action shall not be sustained unless such action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the Court cannot insert one without changing the contract." This view is supported by the cases of *Wilkinson* v. *Insurance Co.*, 72 N. Y., 499; *Arthur* v. *Insurance Co.*, 78 N. Y., 402; *Wilson* v. *Insurance Co.*, 7 R. I., 301; *Insurance Co.* v. *Burr*, 94 Pa. St., 345; *Insurance Co.* v. *Burr*, 128 Pa. St., 386; *Hocking* v. *Insurance Co.*, 130 Pa. St., 170; Ostrander on Insurance, Secs. 410, 411; 2 Beach on Insurance, Secs. 1258–1265; Joyce on Insurance, Sec. 3205.

It is next insisted the Court erred in holding that the contractual limitation ran against plaintiff, although defendant had no officer, agent, or representative in the State upon whom process could be served within one year from the death of Allen B.

Guthrie, the insured. The Circuit Judge held that service might have been had, pursuant to the Act of 1887, Ch. 226, upon the agent formerly representing the company here, and under whose agency this policy was issued. The Court found as a fact that James Witherspoon, former agent of the company, continued to reside in Nashville during the year 1895, and, notwithstanding his relations with the defendant company as agent had been dissolved December 31, 1894, that, for the purpose of maintaining a suit against the company, he was defendant's agent when the original suit was brought, and hence there was not an absence which averted the contractual bar, even if plaintiffs' contention were sound.

The Act of 1887, Ch. 226, which the Court held authorized the service of process on James Witherspoon, former agent, was intended to enlarge the provisions of the Code regulating the service of process on foreign corporations having an officer or agent and a resident local agent in the county in which suit is brought. The Act of 1887 provides that any nonresident corporation "found doing business in this State shall be subject to suit here, so far as relates to any transaction had in whole or in part in this State, or any cause of action arising here, but not otherwise." The second section defines what is meant by "being found doing business in this State as embracing any transactions with persons, or having any transaction concerning any

property situated in this State through any agency whatever acting for it within the State." The Act of 1887 further provides that it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, etc. This Act was held constitutional by this Court in the case of *Life Ins. Co.* v. *Spratley*, 99 Tenn., 322. See also *Telephone Co.* v. *Turner*, 88 Tenn., 268. The proof shows that T. G. Witherspoon, the general agent of this company at the time the policy was issued, and James Witherspoon, who wrote it, remained in Nashville during the entire year 1895, although disassociated from said company after December 31, 1894. But it is insisted by counsel for plaintiff that the Circuit Court erred in holding that the defendant company could be served with process under the Act of 1887, Ch. 226; that, in order to come under the provisions of the Act of 1887, not only must the foreign corporation be found doing business in this State, but this business must be done through some agency acting for it within the State; that the foreign corporation must have an agent within the State transacting its business for it. This Act of 1887 has been held by this Court to apply only to foreign corporations found doing business in this State. *Telephone Co.* v. *Turner*, 4 Pickle, 265; *Life Ins. Co.* v. *Spratley*, 15 Pickle, 322. In the former case it was said "the Code

provisions covered every case where the foreign corporations had a local office and resident agent. It did not cover the case of a corporation having no resident agent, but doing business through or by means of traveling agents. The Act of 1887 does not apply to foreign corporations having resident agents in the county where suit is brought." But, while this is true, the Act clearly contemplates that the foreign corporation must be "found doing business" in this State with persons or concerning property, no matter how slight. It does not appear that this company was found transacting any business in this State during the year 1895, and hence we think the Circuit Judge was in error in holding that service of process might have been had on James Witherspoon under the provisions of the Act of 1887.

The question, then, is narrowed down to this, whether the absence of the defendant company, its officers and agents, during the year 1895, saved the contractual bar. It is insisted this contractual limitation in a policy can be waived, and counsel cite *Semmes* v. *Hartford Ins. Co.*, 13 Wall., 156, in which a condition of war was held to excuse a compliance with this contractual limitation. See, also, *Phœnix Ins. Co.* v. *Underwood*, 12 Heis., 424, to the same effect. We think, however, these cases furnish no analogy for our guidance in this investigation. Such a condition overrules all law and suspends the execution of all contracts, as well as the enforce-

ment of legal remedies. Section 4455 of Shannon's Code provides, viz.: "If at any time any cause of action shall accrue against any person who shall be out of the State, the action may be commenced within the time limited therefor after such person shall have come into the State; and after any cause of action shall have accrued, if the person against whom it has accrued, shall be absent from or reside out of the State, the term of his absence out of the State shall not be taken as any part of the time limited for the commencement of the action." It will be conceded that, if the limitation in this case were statutory, then it would be subject to the statutory exceptions, and absence of the party from the State would be saved from the statutory bar. But this limitation, under all the authorities, is contractual, and, if it is not controlled by the general statute of limitations, it is no more subject to statutory exceptions. Except for the savings of the statute just quoted, absence from the State of a delinquent debtor or suitor would not in any case arrest the running of the general statute of limitations, nor, upon the failure of an original suit for want of service or other statutory cause, could a new action be brought for the same cause against which the general statute would not be a bar. 2 Wood on Limitations, Sec. 296. But these statutes have no application to a contractual limitation, because the parties may lawfully contract to limit the time within which an action upon such contract shall be

brought, and the limitation so imposed is binding upon the parties. 1 Wood on Limitations, Sec. 42, and authorities cited.

Says Mr. Beach in his work on Insurance (Vol. 2, Sec. 2258): "The conditions usual in policies of insurance of all kinds, limiting the period within which suits are to be brought upon them, as to their construction, do not assimilate to the general statutes of limitations of suits. They are treated as part of the contract of insurance, and the same rules governing the construction of other conditions in such contracts are applied—as, for instance, the Courts must confine the parties to the contract they have made, and not to modify or enlarge it to the extent to make a new contract for the parties."

As well said by the Circuit Judge: "If the position of plaintiff's counsel be correct, then a foreign corporation, once doing business within a State, must, in order to maintain a contractual limitation as to suits, keep an agent there indefinitely, although it has formally withdrawn from the State, surrendered its license, and is transacting no business, and, in the case of a life insurance company, this arrangement must be maintained until the maturity of every policy, and twelve months thereafter, notwithstanding the Courts of its domicile are open all the time."

Counsel for plaintiff in error cite the case of *Peoria Ins. Co.* v. *Hall*, 12 Mich., in support of his contention that the operation of the contractual limitation is suspended during the absence of the

company, its officers and agents, from the State. That case, however, is to be differentiated from the case now in judgment in this, that the defendant company was a foreign corporation doing business in that State, and the process was actually issued within the twelve months' limitation of the contract, but was not served until a few days after the expiration of the limitation, on account of the temporary absence of the company's agent. In the case at bar the defendant company had withdrawn from the State. Mr. May, in his work on Insurance (Vol. 1, Sec. 484), in quoting the Michigan case, observes that this importation into the contract of the exception of absence, after the analogy of statutes of limitations, has not elsewhere met with approbation." See, also, *McIntyre* v. *Insurance Co.*, 52 Mich., 189, 195.

The case of *Everett* v. *Niagara Ins. Co.*, Law Journal (a Pennsylvania case), distinctly recognizes the authority of the Riddlesbarger case, and, also, the authority of the Pennsylvania cases cited, but distinguishes that case from the others in the important feature that the original summons had been kept alive by an alias summons duly issued and served.

We think the judgment of the Circuit Judge is sustained by the great weight of authority, and it is affirmed.

WILLS *v.* HURST.

(*Nashville.* January 18, 1899.)

1. PRINCIPAL AND SURETY. *Release of surety.*

Acceptance of the note of the principal obligor by an obligee, not in satisfaction, but as a mere memorandum of the amount due under the bond, does not release a surety.

2. STATUTE OF LIMITATIONS. *On postmaster's bond.*

The limitation of three years, prescribed by Section 3838, Revised Statutes United States, for actions against sureties on the bond of a postmaster, has no application to actions against sureties on a bond given to the postmaster by his assistant.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. H. H. COOK, Ch.

JOHN RUHM & SON for Wills.

A. G. GOODLET and M. T. BRYAN for Hurst.

WILKES, J. Defendant, Hurst, executed a bond to complainant, Wills, in the penalty of $10,000, conditioned for the faithful performance of his duties

as assistant postmaster at Nashville. The other defendants are his sureties. The condition of the bond, among other things, was to faithfully and promptly account for all moneys, letters, and property that might come into his hands, and pay over the same when demanded. It appears that the sums of $334.65 and $100 were charged up to Wills by the postal authorities in settling his accounts, and he paid them July 23, 1894, and December 31, 1895, respectively. The Chancellor, on hearing, gave judgment in favor of Wills for two sums, $287.21 and $76.87, against defendant and his sureties, and against defendant alone for the item of $100 and interest—in all $125.50. Only the surety, Hamilton, appealed.

The Court of Chancery Appeals report that the judgment for $76.87 is not correct, and as to that there is no appeal or further controversy. The only contention in this Court is as to the item of $287.21. The Court reports that Hurst was due Wills this amount on his accounts; that Wills took his note for this amount, and it is contended that this released the bond. The Court, however, reports that Wills only took this note as a memorandum, and not in satisfaction of the debt.

It is insisted that the bond given in this case is a statutory bond. Under the provisions of the Revised Statutes of the United States, Sec. 3838, actions against the sureties are barred after three years. This section applies alone to postmasters in their accounts with the government, and not to as-

sistants of the postmasters and their immediate principals. The bond is not an official one, but an individual one, intended primarily for the benefit of the postmaster, and is intended to cover such defaults as appear in this case.

We are of opinion the Court of Chancery Appeals was correct in affirming the decree of the Chancellor as to this item of $287.21, and, also, in dividing the costs of the appeal, and that complainant is not guilty of culpable negligence, and the decree of the Court of Chancery Appeals is affirmed.

LEWIS *v.* NASHVILLE.

(*Nashville.* January 18, 1899.)

COSTS. *Disallowed, when.*

No fees for service of subpœnas for witnesses will be allowed, either against the city or opposite party, in favor of a salaried policeman and law officer of the city, who has been appointed deputy sheriff with authority to summon witnesses only on behalf of the city in its litigation.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

PRICE & MCCONNICO for city and McConnell.

J. C. MCREYNOLDS for Lewis.

WILKES, J. This is a motion to retax cost. It appears that McConnell holds the position of law officer of the city of Nashville. His duties are to investigate the facts and ascertain the circumstances and hunt up witnesses in all cases in court where the city is a party. He receives from the city a regular monthly salary. It has been the custom of McConnell and his predecessor to collect fees for

subpœnaing witnesses for the city when it gains and costs are charged to the opposing party, but not from the city when it loses a case. This is not the result of any contract or understanding to that effect, but he has not made demand of the city for fees in such cases. He is a member of the metropolitan police force. He is regularly commissioned by the Sheriff of Davidson County as a special deputy for the purpose of executing process issued from all Courts of record in Davidson County where the city is a party and the process issues on behalf of the city, but not otherwise. The motion in this case by Lewis is to disallow any fees for subpœnaing witnesses for the city, inasmuch as the costs are taxed to the defendant, Lewis. It is insisted by McConnell that he does this service for the city, not under its authority, but under the power conferred by the Sheriff, and hence is entitled to his fees as any other deputy would be.

We think it is clear that he may be deputized, and thereby authorized to execute process for the city under the power conferred by the Sheriff. We think it equally clear that for such services he cannot charge the city, as the city pays him a regular salary for his services whatever they may be. If he cannot charge the city when the costs are adjudged against it, we are of opinion he cannot charge the opposing party when the costs are adjudged in favor of the city and against the opposing party. If his fees are not taxable when the

city loses, they are not taxable to the party litigating with the city when such party loses. He may, however, execute the process and the service will be good.

This, we think, is the law of the case, and we think. also it is consonant with the soundest public policy not to allow a party whose business it is to look after lawsuits to subpœna witnesses in such suits and receive compensation therefor. Such a practice might lead to oppression and needless litigation in order to secure fees. While no such charge or allegation is made in this case, and there is no proof of such practice, this must be its tendency.

We are of opinion, therefore, that while the law officer may execute process under the Sheriff's deputation for the city, he can make no charge therefor, but must look to his salary as his compensation for such services as well as for other services.

We are of opinion the action of the Circuit Judge in eliminating and cutting out these fees was correct, and his judgment is affirmed with costs.

RAGIO *v.* COLLINS

AND

BANK *v.* SCOGGINS.

(*Nashville.* January 18, 1899.)

SUPREME COURT. *Has no power to appoint administrator ad litem.*

The Supreme Court has not authority to appoint an administrator *ad litem* upon the estate of a party who died while his case was pending before that Court.

Act construed: Acts 1889, Ch. 137.

Code construed: § 3954 (S.).

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. JOHN W. CHILDRESS, Ch.

LELLYETT & BARR for Ragio.

COOPER & COOPER for Collins.

BRYAN & CARTWRIGHT for Mechanics' Bank.

STOKES & STOKES, N. D. MALONE, and H. PARKS for Scoggins.

WILKES, J. In these cases applications are made to appoint administrators *ad litem* in this Court upon the estate of parties who have died since the cases were appealed and who have no administrators.

The Ragio cases are controversies arising at law, and the Scoggins case is one in chancery. No opposition is made, and in the latter case a written consent is filed to the application.

The authority for the appointment of administrators *ad litem* is conferred by the Act of 1889, Ch. 137, brought into Shannon's compilation as § 3954. This section only authorizes the appointment of such administrators in the Probate and Chancery Courts, and any other Courts having chancery jurisdiction, and devolves the duty of such appointment upon the Judge of such Court.

We are of opinion the authority does not apply to law Courts, unless it may be in cases of equitable cognizance, nor does it apply to this Court, but only to Courts of original jurisdiction.

It is true this Court has jurisdiction of cases equitable, legal, and criminal, but its jurisdiction is *appellate only*, under the provisions of the Constitution. The wording of the Act indicates clearly that it was not intended to apply to this Court, and there are very cogent reasons why this Court should not have or exercise the power. We are of opinion that this Court has not the power to make such appointment, and the application is denied in each case.

PARTEE *v.* GOLDBERG.

(*Nashville.* January 18, 1899.)

CHANCERY PLEADING AND PRACTICE. *Dismissal of original bill does not discontinue cross bill.*

Complainant's voluntary dismissal of the original bill, after cross bill, or answer as cross bill, has been filed, averring facts upon which specific and affirmative relief is claimed and may be granted, and after proof has been taken upon the issues presented by the original and cross bill, does not operate to discontinue or terminate proceedings under the cross bill.

Code construed: § 6133 (S.); § 5066 (M. & V.); § 4323 (T. & S.).

Cases cited: Odom *v.* Owen, 2 Bax., 450; Nichol *v.* Nichol, 4 Bax., 158; Comfort *v.* McTeer, 7 Lea, 662; Croft *v.* Johnson, 8 Bax., 394; Fisher *v.* Stovall, 85 Tenn., 316.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. H. H. COOK, Ch.

A. S. COLYAR and F. G. EWING for Partee.

STOKES & STOKES for Goldberg.

WILKES, J. The question presented in this case is whether, after an answer has been filed as a cross bill, and has been replied to, and proof taken on the issues presented by the original and cross

bill, the complainant has the right to dismiss his original bill and take with such dismissal the cross bill, and thus terminate the controversy raised by it.

It appears that complainants dismissed the original bill, and afterwards, at the same term, defendants were permitted to have the case reinstated on the docket for the determination of the matters arising under the cross bill. The cause was then heard by the Chancellor upon the original bill, the answer and cross bill, and proof, and he held that neither the original nor cross bill was supported by the proof, and both were dismissed. The decree further adjudicated that the attempted dismissal of their suit by the complainants was ineffectual, and could not avail to take away the right of defendants to proceed on the cross bill. Complainants alone appealed. The Court of Chancery Appeals affirmed the decree of the Chancellor, and complainants appealed to this Court.

The Court of Chancery Appeals report that the cross complainants did not appeal from the decree of the Chancellor dismissing their bill, and that complainants failed to make out by proof the fraud alleged, necessary to make out their case. So that the only question before us is the one already stated—whether the cross complainants were entitled to be heard on their cross bill after the complainants had dismissed their original bill.

The cross bill made charges against complainants, arising out of the matter set up in the original

bill, and sought specific and affirmative relief. The general rule is stated to be that the dismissal of the original bill carries with it the cross bill, as the latter is ordinarily considered merely an auxiliary of, and dependent on, the original bill, and this is certainly the case where the subject-matter of the cross bill is simply defensive of the case made by the original bill. 5 Enc. Plead. & Prac., 662, 663. But when the cross bill sets up additional facts relating to the subject-matter embraced in the original bill, but which facts are not alleged in the original bill, and asks affirmative relief, the dismissal of the original does not dispose of the cross bill, and the latter remains for disposition as if it had been filed as an original bill. 5 Enc. Plead. & Prac., 663; see cases cited in footnotes.

Under our practice and the provisions of our statute (Shannon, § 6133), an answer filed as a cross bill has the same force and effect as if the defendant had answered and then filed a cross bill, and is not limited to the purposes of defense alone, but is an auxiliary suit for the purpose of enforcing rights growing out of the transaction involved in the original suit, but set up in the cross bill, and of bringing forward offsets and counter demands. *Odom* v. *Owen*, 2 Bax., 450; *Nichol* v. *Nichol*, 4 Bax., 158; *Comfort* v. *McTeer*, 7 Lea, 662.

It is said, however, that there is a distinction between a cross bill proper and an answer filed as a cross bill upon the point of practice here involved.

It appears that Chancellor Cooper held, in 3 Tenn. Chan. Rep., 284, that a cross bill is simply defensive, and if the original bill is dismissed the defense necessarily fails also, and although a regular cross bill might in some cases be treated as an original bill, no such favor can be shown to an answer filed as a cross bill, and in that case he held that the answer filed as a cross bill must go with the original bill, though it charged facts calling for affirmative relief. Chancellor East, in the Court below, held the same rule in *Nichol* v. *Nichol*, reported in 4 Baxter, 158, but the Supreme Court did not sustain this holding, but said the cross bill, and answer as a cross bill, stood on the same ground, and the dismissal of the original bill did not carry with it the answer and cross bill. In *Fisher* v. *Stovall*, 1 Pick., 316, it was held that even when there was no cross bill the original bill could not be dismissed without the consent of defendant in cases where there has been an interlocutory decree determining a right in favor of defendant against complainant, or deciding a matter in which defendant has an interest. This is in accord with the general rule as laid down in *Croft* v. *Johnson*, 8 Bax., 394; 6 Enc. Plead. & Prac., 848.

We are of opinion, therefore, that complainant did not have the power to deprive the defendant of the right to a hearing upon his cross bill by dismissing the original. The Chancellor heard the case on the matter set up in the original and cross bill,

and decided that cross complainants were entitled to no relief, and they did not appeal. The complainants also failed to sustain their original bill, both before the Chancellor and Court of Chancery Appeals, so that the only useful result of the litigation appears to be to adjudge the costs and settle a rule of practice which results in no substantial judgment for either party.

The decree of the Court of Chancery Appeals is affirmed.

State *v.* Oden and State *v.* Fitzgerald.

STATE *v.* ODEN

AND

STATE *v.* FITZGERALD.

(*Nashville.* January 21, 1899.)

COSTS. *Motion for, does not lie against Clerk, when.*

Motion does not lie against the Clerk of a court on behalf a defendant in a criminal case to recover costs alleged to have been illegally collected by the Clerk, where the defendant voluntarily paid the costs and made no demand for their return until the Clerk had, pursuant to law, paid them into the public treasury.

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. J. M. ANDERSON, J.

Attorney-general PICKLE for State.

F. C. MAURY, E. T. MORRIS, and J. E. TURNEY for Oden and Fitzgerald.

WILKES, J. These cases have been treated as motions to retax costs. They are not properly mo-

tions to retax costs, but motions against the Clerk of the Criminal Court, to hold him responsible personally for the improper collection of certain District Attorneys' fees, charged up by him in the bills of cost and paid by the defendants. No notice was given the State of the motion, but it was only given to the Clerk, and in this Court it is disclaimed that it is sought to reach the State treasury for these amounts, which have been paid into the State treasury by the Clerk, but the motion is to hold the Clerk individually responsible for the improper taxation and collection of the fees as cost. The cases were heard in the Court below upon a statement of facts agreed to by the parties complaining and the Clerk of the Court, and the trial Judge refused to give any relief, and the parties affected have appealed to this Court.

From the agreed statement of facts it appears that the parties complaining were indicted and prosecuted in the Court below, Oden for a felony and Fitzgerald for a misdemeanor. In each case a *nolle prosequi* was entered, and defendants were directed to be discharged on payment of costs. In the felony case the Clerk taxed up $10 as the District Attorney's fee, and in the misdemeanor case a fee of $5 for the same purpose. The bills of costs, including these fees, were paid by the respective defendants, and they were thereupon discharged. When the Clerk collected these fees he paid them over into the State treasury, as required by what is com-

monly called the Estes fee law, and this payment was made before the Clerk had any notice that he would be proceeded against for improperly collecting such amounts.

Under this statement of facts, no motion will lie against the Clerk for the improper collection of these fees. They are not in his hands, but in the State treasury. Whether the costs could be re-taxed, so as to reach the State treasury, does not arise, as such attempt is expressly disavowed. So far as this record shows, the defendants paid these fees, as costs, willingly, and made no motion to have them refunded while in the hands of the Clerk. We need not consider, under these facts and this motion, whether they were properly or improperly taxed.

The sworn statements of the defendant, Fitzgerald, in his case, and of J. L. Pendleton, in the Oden case, were heard by the Court, substantially to the effect, and for the purpose of showing, that the defendants were to be taxed full costs, as upon conviction, and that they saw the items, and made no objection thereto. These statements were excepted to, on the ground that they were attempts to add something which did not appear in the judgments of *nolle prosequi*. The objection was overruled by the trial Judge, and, we think, correctly, but we think the affidavits are immaterial. The Court will presume the defendants knew the items in the bills of costs, and assented thereto when they paid them. While they objected to the State and county tax,

and were, by the Court, relieved of these on application, they made none to these items until after they had paid them to the Clerk and he had covered them into the State treasury.

The judgment of the Court below is affirmed in each case, with costs.

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MAYFIELD *v.* STATE.

(*Nashville.* January 21, 1899.)

1. EVIDENCE. *Of cause of death.*

The opinion of a medical expert is not essential, in a murder case, to prove that the death resulted from the wound inflicted by defendant, especially where it appears that deceased was in previous good health, and had proper medical treatment, and there is no suggestion of any other cause of death. That the death resulted from the wound may be shown by circumstances, and it is so shown in thiscase. (*Post, pp. 675, 676.*)

Case cited: Lemons *v.* State, 97 Tenn., —.

2. SAME. *Res gestæ.*

A statement of the deceased, made thirty minutes after the difficulty, is not admissible, on behalf of defendant, as part of the *res gestæ.* It is mere hearsay. (*Post, p. 676.*)

3. JUDGMENT. *In criminal case, void.*

A judgment, upon a verdict of guilty of voluntary manslaughter, fixing the term of defendant's imprisonment at one year, is unwarranted and erroneous, the statute prescribing two years as the minimum punishment for this offense. (*Post, pp. 676–679.*)

Cases cited: Wattingham *v.* State, 5 Sneed, 564; Murphy *v.* State, 7 Cold., 516; State *v.* Ragsdale, 10 Lea, 671.

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. A. H. MUNFORD, J., sitting by interchange.

A. J. CALDWELL and JUDGE QUARLES for Mayfield.

Attorney-general PICKLE for State.

MCALISTER, J. The plaintiff in error was indicted in the Criminal Court of Davidson County for the murder of one James Barnes. The record discloses that deceased had married a sister of the prisoner, Joe Mayfield, and that the latter had been invited by deceased to stay at his house during his absence in Williamson County. On the evening of the tragedy deceased returned from Williamson County, accompanied by George Mayfield, father-in-law of deceased, and father of the prisoner, Joe Mayfield. Deceased had been drinking some—had taken one or probably two drinks of apple brandy, but was not intoxicated. When the wagon was stopped in front of the house, deceased and his father-in-law, George Mayfield, proceeded to unload a lot of cobs, which they had brought from the country for the purpose of burning in the kitchen stove. About this time the prisoner came out of the house and walked toward the wagon, when he was accosted by the deceased with the remark, "Joe, you must get another boarding house." An altercation then ensued, and insulting language was used. The State's witnesses testify that the prisoner applied a most opprobrious epithet to deceased, whereupon the latter got out of the wagon and started toward the prisoner with a cob in his hand. The prisoner thereupon picked up a stone and threw it at de-

ceased, striking him in the temple and felling him to the ground. This occurred about 4 o'clock in the afternoon, and that night, about 9 o'clock, Barnes died from the effect of the wound.

It was suggested in argument that no medical expert testified that the death resulted from the wound, and that, on this account, the proof is insufficient to warrant a conviction. The proof is that, up to the time the deceased received this wound, he was in good health and able to engage in his usual occupation. It is not suggested in proof that he died from any other cause, or that his death could have been superinduced by any other cause.

We held, in the case of *Lemons* v. *State*, 97 Tenn., —, a capital case, that it is not essential that the State should, in a murder trial, prove by expert testimony that the death resulted from the wound, when there is no suggestion of death from any other cause, and the deceased was shown to have been of previous good health, and that he received proper medical treatment.

It is shown in this case that deceased was struck on the left side of the head just above the ear, and that the wound produced a dent in the head. We gather from the record that the temporal bone, which is the thinnest bone in the skull, was probably fractured or indented. The deceased soon became unconscious. He was treated by competent physicians, who were called in to see him, and died

at nine o'clock. We have no doubt, on the record, that deceased died from the effect of the blow delivered by the defendant.

It was next objected that the Court erred in excluding the declarations of deceased made thirty minutes after the difficulty. This testimony was not offered as dying declarations. It was an effort to prove by the widow of deceased that thirty minutes after the difficulty deceased said if he could have gotten to him he would have cut his heart out, using an oath and brandishing a clasp-knife which he usually carried. These statements were not a part of the *res gestæ*, nor dying declarations, but mere hearsay, which were properly excluded by the Court.

A more serious question arises upon the judgment entry in the case. It recites that "the jury find the defendant guilty of voluntary manslaughter, and assess his punishment at one year's imprisonment in the State penitentiary." This is an unwarranted verdict, since the minimum punishment for the crime of voluntary manslaughter is two years' imprisonment. It is true the assessment of a less punishment than that prescribed by law is to the prisoner's benefit, rather than to his disadvantage.

"The rule that a party cannot assign for error that which is for his own advantage applies as well to criminal as to civil proceedings." *Wattingham* v. *State*, 5 Sneed, 564. In that case the prisoner was indicted for grand larceny. The jury found him

guilty in manner and form as charged in the indictment, but fixed his term of confinement in the penitentiary at two years, whereas, three years was the minimum term for grand larceny. "The conviction," said the Court, "is in form for grand larceny, but in effect for petit larceny, and there can be no doubt that the jury intended to convict him of the lesser offense only. The incongruity on the face of the verdict was assigned for error. . . . The gist of the complaint is that his term of confinement in the State penitentiary is shorter than that prescribed by law; that, instead of two years, it ought to have been three years. The error," said the Court, "is formal merely, and cannot be made available for the prisoner." The Wattingham case, however, is limited and explained in the subsequent case of *Murphy* v. *State*, 7 Cold., 516. Said the Court, viz.: "Larceny is divided into two grades; one is distinguished as grand larceny, the other as petit larceny. The greater offense embraces the lesser, and the punishment prescribed for each is proportionate to the magnitude of the offense, and for the lesser offense the jury were authorized by law to fix the punishment of the accused at two years' imprisonment in the penitentiary, and the Court said this was in effect a conviction of 'the lesser offense only,' and, in that view of the case, held that the error was formal merely and could not be made available for the prisoner. As applicable to the facts of that case, we think the ruling

of the Court was correct, but this record presents a very different case. The accused (Murphy) is indicted for the crime of feloniously breaking open the house of another for the purpose of committing a larceny therein. The law recognizes no different grades in this offense. It is not divided into different degrees, with different punishments prescribed for each, as is the crime of larceny. One specific punishment is prescribed—that is death; but the jury may, in their discretion, commute this to another specific punishment—that is, imprisonment in the penitentiary not less than ten nor more than twenty-one years."

In the Murphy case the jury found the prisoner guilty in manner and form as charged in the indictment, and assessed his punishment at imprisonment in the penitentiary for a period of five years. "The law," said the Court, "prescribes the punishment incident to a conviction of this offense, and neither Courts nor juries can substitute another or different punishment. Having found the defendant guilty of the offense, and having commuted the punishment to imprisonment in the penitentiary, all that remained to be done that the jury was authorized to do was to fix the time at any period their discretion might dictate, from ten to twenty-one years. It follows, then, that so much of the verdict of the jury as proposed to fix the term of imprisonment of the accused at five years was not only erroneous, but wholly unauthorized. The verdict was

a mere nullity, and the Court had no power to pronounce a judgment upon it."

In the case of *State* v. *Ragsdale*, 10 Lea, 671, defendant, Ragsdale, was indicted for an assault with an intent to commit murder in the first degree. He was found guilty of an assault with an intent to commit murder in the second degree, and the jury assessed his punishment at a fine of $500 and the costs, $——. This latter offense is punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not more than one year, and by fine not exceeding $500, at the discretion of the jury. In that case, the verdict of the jury merely assessed the punishment at a fine. "The statute," said the Court, "clearly prescribes that the punishment shall be by imprisonment, either in the penitentiary or the county jail. The verdict was, therefore, not warranted by the law, and no judgment could be rendered on it." Citing *Murphy* v. *State*, 7 Cold., 516.

We think the verdict in the case at bar falls within the rule announced in the two cases last cited, and is therefore a nullity, upon which no valid judgment could be pronounced. It results that the judgment must be reversed and the case remanded for a new trial.

HARKREADER *v.* TURNPIKE CO.

(*Nashville.* January 25, 1899.)

TAXATION. *Charter exemption of turnpike company.*

A turnpike company is exempt from *ad valorem* but not from privilege tax, under a clause in its charter providing that "the property in said road, when completed, shall vest in said company and their successors, for the purpose of a highway, which shall be free for all persons, on the terms and conditions herein prescribed, and the same shall not be liable for taxation."

Case cited and approved: Railroad *v.* Harris, 99 Tenn., 696.

Cited and distinguished: Memphis *v.* Bank, 91 Tenn., 556; Memphis *v.* Insurance Co., 6 Bax., 527.

FROM WILSON.

Appeal in error from Circuit Court of Wilson County. W. C. HOUSTON, J.

Attorney-general PICKLE for Harkreader.

E. E. BEARD and R. P. MCCLAIN for Turnpike Company.

WILKES, J. This is a suit brought by the turnpike company to recover back a privilege tax paid the State under protest. The tax was assessed under the provisions of an Act of the General Assembly

passed at the extra session of 1891, providing for a privilege tax upon turnpikes that collect tolls at their gates both ways the same day. The trial Judge held the company not liable for the tax, and gave judgment that it be refunded, and the defendant appealed and assigned errors.

The company insists that it is not amenable to this Act nor liable for this tax because of an exemption clause in its charter, as follows: "The property in said road, when completed, shall vest in said company and their successors for the purpose of a highway, which shall be free for all persons on the terms and conditions herein prescribed, and the same shall not be liable for taxation." But for this provision, the tax could clearly be collected under the ruling in the turnpike cases reported in 8 Pickle, 369, and the question is as to the effect of this charter exemption.

It is insisted that, recognizing the principle that clauses exempting from taxation shall be strictly construed, still the provision in this charter is broad enough to exempt the company from all taxation, and that, viewed in the light of the policy of the State in 1836, when this charter was granted (which was to encourage public internal improvements), such was the intention and purpose of the Legislature. It is ingeniously argued that it is the highway that is exempt—that is, the entity, with all its uses, property, and franchises, including the privilege of operating it—and not simply its property, and that the

exemption of the highway meant the use and the operation of the highway, and not simply the exemption of its tangible property. It is evident that when this charter was granted the two systems of State taxation—*ad valorem* and privilege—had already been put into practical operation, and were fully recognized by the Constitution of 1834. This charter was granted to men who were of the highest note in the State at that date, among the charter members being Andrew Jackson, James C. Jones, Stokely Donelson, Philip Lindsley, and others of scarcely less repute, who were certainly as familiar with the law as any citizen of the State at that date, and it is argued that if they intended to secure exemption from both *ad valorem* and privilege taxes they would have so provided in express terms. Perhaps this argument is not strictly correct, and a more rational view is that at that period in the history of our State the nice distinctions made in the modes of taxation, to evade taxation on the one hand and to apply it on the other, had not been reduced to the fine art it has become in later years; and it is more than probable that it escaped the observation of these distinguished gentlemen that the road might be exempt from one mode or manner of taxation, and yet be subject to another. We think, applying the rules of grammatical construction to the provision of exemption, it means the property of the corporation shall be exempt, and, if read properly, is, in substance, this: that the property shall not be liable

to taxation, but shall vest in the corporation for purposes of a highway, to be used by the public on the terms set out in the charter.

If we adopt the rule of strict construction applicable to charter exemptions, the same result would follow as in case of the grammatical construction. We think the case is identical in principle with that of *Railroad* v. *Harris*, 15 Pickle, 696, except that in the latter case certain species of property—designed, no doubt, to cover all that was taxable—were enumerated, while in the present case the proper construction of the language is that all property of the company should be exempt. But the property of a corporation is one thing and the privilege of operating that property under franchises granted by the Legislature is another and separate thing, and when one is exempt it does not follow that the other is also. To have that effect, such must be the plain provision or unavoidable construction of the exempting clause. Hence, as we think, the case of *Memphis* v. *Bank & Insurance Cos.*, 91 Tenn., 556, is not an authority for sustaining a grant of exemption in this case. In that case the charter provided that the tax imposed by it should be in lieu of all other taxes. There was no exemption involved. It was simply a manner of taxation, designed to reach not only the property and stock, but, also, the business and occupation of the company, and to determine the tax as a whole. The case of *Memphis* v. *Hernando Ins. Co.*, 6 Bax., 527, is a case of the

same class and based upon the same idea—not of exempting the property or the privilege, or of taxing the one and exempting the other, but of providing a certain tax for the capital invested and the enjoyment of the franchises granted, and was a means of determining what that tax should be.

We are of opinion that the exemption in this charter relieves the company from *ad valorem* taxation upon its property, but not a privilege tax for the right to exercise the franchise granted to them in the use of the property.

It may be argued that the exemption of the property would thus become a barren grant, since its value depends alone upon the use to which it may be put—that is, its operation as a highway. But a similar objection might be made to the taxation of merchants, who, under the law, were required to pay both an *ad valorem* tax upon their stocks of goods and a privilege tax for the privilege of selling them. In such case, the only use the merchant has for the goods is to sell them, and a plausible argument could be made, that, when he paid an *ad valorem* tax upon their value, he should not be required, in addition, to pay a tax for the privilege of selling them. The same argument was urged in the case of *Railroad* v. *Harris*, where the property of the railroad was exempt, and it was insisted this was but a mockery if it could be made to pay a tax for the privilege of using the property.

We do not think the exempting clause in this charter is broad enough to relieve the company from a privilege tax as well as a property tax, and the judgment of the trial Judge is reversed, and case dismissed at the cost of the turnpike company.

HARPER *v.* TURNER.

(*Nashville.* January 25, 1899.)

1. ATTACHMENT. *Void, when.*

A Justice's writ of original attachment that does not run in the name of the State is void.

Cases cited; Mayor *v.* Pearl, 11 Hum., ——; McLenden *v.* State, 92 Tenn., 525; Wiley *v.* Bennett, 9 Bax., ——.

2. AMENDMENT. *Of void process.*

A Justice's writ of original attachment, void for failure to run in name of State, cannot be amended in the Circuit Court after appeal, so as to remedy this defect.

FROM RUTHERFORD.

Appeal in error from Circuit Court of Rutherford County. W. C. HOUSTON, J.

MCLEMORE & RICHARDSON for Harper.

BROWN & LYTLE for Turner.

MCALISTER, J. Suit by original attachment, before a Justice of the Peace, to enforce a landlord's lien on his tenant's crop for rents. Summons was issued at the same time and served upon the tenant. Judgment was pronounced by the Justice of

the Peace in favor of plaintiff, and sale of crop ordered. Defendant appealed, and in the Circuit Court moved to quash the writ of attachment upon several grounds, and, among others, that the writ did not run in the name of the State, as required by the Constitution. On motion of plaintiff, the Court permitted the attachment to be amended in the respects complained of. This action of the Court is now assigned as error. The contention of defendant is that the writ was void, because it did not run in the name of the State, as required by the Constitution, and was not amendable in this respect. This position is well taken. By the common law process was not amendable where it appeared upon the face of it that it was void. If the process was not a nullity, the old rule was that an amendment would be allowed where there was anything to amend by. 1 Am. & Eng. Enc. Pl. & Pr., 658.

In *Mayor and Aldermen* v. *Pearl*, 11 Hum., it was held that the provisions of the State Constitution, that "all writs and other process shall run in the name of the State of Tennessee," applies to a distress warrant issued by the Recorder of a municipal corporation to collect a privilege tax, and such omission renders the warrant void. *McLendon* v. *State*, 8 Pickle, 525.

In *Wiley* v. *Bennett*, 9 Bax., it appeared that the writ of attachment had been issued without the signature of the Clerk. The Constitution of the State requires that all process shall run in the name

of the State, and bear teste and be signed by the respective Clerks. The Court held that the writ of attachment without the signature of the Clerk is no more than a piece of blank paper, and must be held void. "An amendment," said the Court, "cannot aid this, as a new writ must be made by the signature of the Clerk, and this must be levied on the property, the levy under the void writ being a nullity."

This case falls within the principle of the cases cited, and the attachment is, therefore, void. Plaintiff, however, is entitled to an affirmance of his judgment on the note.

HULLETT *v.* BAKER.

(*Nashville.* February 1, 1899.)

1. BREACH OF PROMISE. *Action for, abates, when.*

The defendant's death abates an action for breach of promise to marry. (*Post, pp. 692, 693.*)

Code construed: § 4569 (S.); § 3560 (M. & V.); 2846 (T. & S.).

Case cited and approved: Weeks *v.* Mays, 87 Tenn., 442.

2. SAME. *Action for, abates after reversal, when.*

Defendant's death, pending his appeal from an adverse judgment, operates to abate an action for breach of promise to marry when the judgment is subsequently reversed and the cause remanded. Upon reversal of the judgment, the action again becomes one for tort, and abatable. (*Post, pp. 691, 692.*)

Cases cited and approved: Akers *v.* Akers, 16 Lea, 7–12; Kimbrough *v.* Mitchell, 1 Head, 541; Baker *v.* Dunsbee, 7 Heis., 231.

3. PLEADING AND PRACTICE. *Remanding for new trial.*

An order remanding a cause for a new trial means the same thing as remanding it for further proceedings. It is not an adjudication that there shall be another trial on the merits, and does not preclude any proceedings by plea in abatement or otherwise, which may be lawfully interposed. (*Post, p. 691.*)

4. SAME. *Motion to strike out replication.*

A motion to strike out a replication, made on behalf of the executor and by his attorneys, and so treated and acted on by the Court, will be sustained in this Court, although the record,

by inadvertence, recites that the motion was made by the heirs, who were not parties to the cause. (*Post, p. 691.*)

FROM SUMNER.

Appeal in error from Circuit Court of Sumner County. A. H. MUNFORD, J.

B. D. BELL and W. C. DISMUKES for Baker.

J. J. TURNER, T. C. MULLIGAN, and S. F. WILSON for Hullett.

WILKES, J. This is an action for breach of marriage contract. There was a judgment against the defendant for $1,500. He appealed to this Court, and after the appeal, while the cause was pending in this Court, he died. At a former term the suit was revived against his executor, and heard upon its merits, and the judgment reversed and cause remanded. The order remanding recites that it is for the purpose of a new trial. In the Court below, after the cause was remanded, the defendant, as executor, pleaded in abatement the death of the defendant. There was a replication admitting the death and other facts stated in the plea, but insisting that the suit did not abate. The trial Judge sustained the plea in abatement and dismissed the suit, and plaintiff has appealed and assigned errors.

It appears from the record that the plea in abatement was filed on behalf of the executor and heirs, and was sworn to by an attorney styling himself as attorney for both. As before stated, there was a replication to this plea, insisting that the question of revivor had already been adjudged by this Court, and the suit revived and remanded for a new trial. There was a motion to strike this replication from the files, which was granted. The record recites that this motion was made on behalf of the heirs, by attorney, and the error assigned is that the heirs were not parties, not interested, and could not make such motion. We think this is a mere clerical error or inadvertence in entering the motion. It was made by the attorney who was representing the executors, and was evidently on their behalf, and was so treated and acted on by the Court.

It is further insisted that the plea was not sufficient, and that the suit could not be abated, but had been revived in this Court and remanded to the Court below for a new trial. The entry remanding for a new trial means the same as remanding for such further proceedings as the parties might be entitled to, and did not necessarily mean a retrial on the merits only, nor did this Court adjudicate, or intend to do so, that the suit might not in the Court below be abated.

We are of opinion there is no error in the proceedings. It has been held that a recovery of a judgment for a tort merges the tort into the judg-

ment, and thus it becomes a debt. If an appeal in the nature of a writ of error is taken to this Court the judgment of the Court below is suspended, but not vacated during the appeal. A revivor may, therefore, be had in this Court against the personal representative of the deceased defendant in such case, in order to test the correctness of the judgment. If the judgment is reversed the result is to vacate and set aside the judgment below, and the cause of action is restored to its original character, and the death of the wrongdoer may then be pleaded in abatement, the judgment having been vacated and being no longer in existence. The action then becomes one upon the original demand, and is subject to abatement as though no judgment had ever been rendered upon it. *Akers* v. *Akers*, 16 Lea, 7–12; *Kimbrough* v. *Mitchell*, 1 Head, 541; *Baker, Admr.*, v. *Dansbee*, 7 Heis., 231.

The only question remaining is whether this is such an action as under the statute abates by the death of the defendant. This had been held in the affirmative in the case of *Weeks* v. *Mays*, 3 Pickle, 442, on the ground that it is an action which necessarily involves and affects the character of the plaintiff, and is therefore within the excepting clause of the statute (Shannon, § 4569), which provides that "no civil action commenced, whether founded on wrongs or contracts, except for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived." This being a wrong

which, under the case referred to, necessarily affects the character of the plaintiff, it abates by the death of the defendant.

This is conclusive, and the judgment of the Court below is affirmed with costs.

STATE *v.* DISMUKES.

(*Nashville.* February 1, 1899.)

1. BOND TO KEEP THE PEACE. *Joint, by two.*

Under proceedings to keep the peace, a separate bond should be required of each defendant; but if two defendants give a joint bond it is valid, and may be enforced upon a breach by either. (*Post, pp. 696, 697.*)

2. SAME. *Return of bond to Circuit Court.*

A bond to keep the peace, taken by a Justice of the Peace, must be returned to the Circuit Court of the county by the first day of the next succeeding term, whether there is an appeal or not. (*Post, p. 697.*)

Code construed: §§ 6903, 6915 (S.); §§ 5770, 5781 (M. & V.); §§ 4942, 4953 (T. & S.).

3. SAME. *Power of Circuit Court.*

The Circuit Court may proceed to determine whether there has been a breach of a bond to keep the peace before the defendant has been tried and convicted of the offense constituting the alleged breach. (*Post, p. 697.*)

Code construed: § 6921 (S.); § 5788 (M. & V.); § 4960 (T. & S.).

4. SAME. *Defendant has right to jury trial.*

The defendant is entitled to a jury trial in the Circuit Court of the question as to his breach of his bond to keep the peace. (*Post, pp. 697, 698.*)

5. SAME. *Notice sufficient, when.*

Notice that forfeiture of a peace bond will be moved for in the Circuit Court is sufficient in its recitals, which embodies all the proceedings before the Justice of the Peace, recites and sets out the bond and the breach thereof, with the particulars of the breach. (*Post, pp. 698–700.*)

Code construed: §§ 6903, 6921 (S.); §§ 5770, 5788 (M. & V.); §§ 4942, 4960 (T. & S.).

State *v.* Dismukes.

6. SAME. *Clerk cannot issue notice of forfeiture, when.*

The Clerk of the Circuit Court has no authority, without an order of the Court, made upon suggestion of the District Attorney-general directing it, to issue notice of the contemplated forfeiture of a peace bond. (*Post, pp. 699, 700.*)

Code construed; § 6903 (S.); § 5770 (M. & V.); § 4942 (T. & S.).

Cases cited and approved: Hillsman *v.* Hickerson, 3 Head, 575; Frierson *v.* Harris, 5 Cold., 146.

FROM SUMNER.

Appeal in error from Circuit Court of Sumner County. A. H. MUNFORD, J.

Attorney-general PICKLE, and J. J. TURNER for State.

SEAY & SEAY, B. D. BELL, J. A. TROUSDALE, and G. W. BODDIE for Dismukes.

WILKES, J. The question presented in this case is whether the trial Judge erred in sustaining a demurrer, to what is treated in the record as a *scire facias*, to have a forfeiture of a peace bond declared. It appears that W. C. Dismukes and his son, Martin Dismukes, had been required by a Justice of the Peace of Sumner County to enter into a bond for $500, conditioned to keep the peace, especially as against J. C. Rodes and Charles E. Rodes. There is a recital that they appealed from

the judgment of the Justice to the Circuit Court, but no bond for appeal was given, as required by the statute (Shannon, § 6914). The papers were, however, returned into the Circuit Court under § 6915, Shannon. After the papers were filed in Court a *scire facias* was issued by the Clerk of the Court, requiring the parties to appear and show cause why judgment should not be rendered on said bond for a violation of its terms. One writ was issued to Sumner County, and returned executed as to W. C. Dismukes, but not as to Martin Dismukes; a duplicate was issued to Davidson County for Martin Dismukes and served on him in that county. In this *sci. fa.* the proceedings of the Justice of the Peace are set out *in extenso*, and they are made a part of the *sci. fa.* It also recites that, after the bond was issued, Martin Dismukes shot J. C. Rodes upon the Public Square in Gallatin.

There appears to be an indorsement upon it showing that it was issued by order of the District Attorney-general, but there is no recital to that effect in the body of the *sci. fa.*

A demurrer was filed upon the return of this paper executed, and several grounds were set out, which need not all be specially mentioned.

It is said the peace bond was a joint one for both father and son, and such a bond was not proper. This is true. A separate bond should have been required of each defendant bound over; but having

executed a joint bond, each of the parties are bound by its stipulations, and it can be enforced against either or both, if violated, and proper steps taken to declare a forfeiture.

The practice, in case of proceedings to keep the peace, is laid down in the statutes (Shannon, §§ 6904–6925), but the matter has been but rarely before the Court. It is clear, however, from § 6915, that all bonds taken by Justices of the Peace, under the provisions of the statute, are to be returned into the Circuit Court of his county by the first day of the next term of the Court, and any further proceedings upon the bond are to be had in that Court, whether an appeal is taken or not. See, also, Shannon, § 6903.

Section 6921 provides as follows: "An undertaking to keep the peace is forfeited by the commission by the defendant of any offense upon the person or property of another, which may be ascertained by a jury without the conviction of the defendant therefor in the Circuit Court, upon ten days' notice to the parties against whom the forfeiture is sought."

We think it clear that under this section the Court may proceed to determine whether the terms of the bond have been breached by the defendants, whether they have been tried or convicted of any offense or not, and without waiting for such trial. There is more difficulty as to the manner in which the Court may proceed. The defendant is clearly entitled to a trial by jury of the question as to

whether he has breached his bond or not, and is also entitled to ten days' notice that a forfeiture will be sought.

The statute, § 6921, above quoted, does not prescribe who shall issue this notice, nor at whose instance, nor what it shall contain. Upon principle it is evident that the proceeding to have a forfeiture declared should be by the State and at the instance of its representative, the District Attorney-general, since the offense is against the State. See, also, § 6903, Shannon. But the statute, § 6921, does not prescribe who shall issue the notice or *scire facias*, nor what it shall contain, nor does § 6903.

We think there can be no criticism of the matter set out in the *scire facias*, which is evidently intended as notice under the statute, as its recitals are very full, setting out verbatim the proceedings before the Justice of the Peace, with copies of the original affidavit, the judgment of the Justice, the bond given before him, in short, all the papers in the case up to the time the summons issued, and a recital that the bond had been breached, and the particulars of the breach. It is objected that the copy issued to Davidson County does not purport to be a counterpart, but appears as an original. This is at best an informality that does not go to the merits of the case, and the party having appeared and defended upon other grounds as well as that of jurisdiction, the defect, if any, on this point is waived. But the important question in the case is,

whether this notice or summons or *scire facias* prescribed by the statute, can be issued by the Clerk without the order of the Court first had. If we treat it as a *scire facias*, and it seems to be more nearly assimilated to that proceeding than any other, and is so called in § 6903, then, its issuance is a judicial act and must be based upon a suggestion entered upon the record, and it must be awarded by the Court, and the Clerk has no power or authority to issue the writ unless empowered by a rule of the Court or by some statutory provision. *Hillman Bros.* v. *Hickerson*, 3 Head, 575; *Frierson, Administrator*, v. *Harris*, 5 Cold., 146.

There is no statutory provision authorizing the Clerk to issue such notice, or *sci. fa.*, and no rule or order of Court was obtained in this case. We are of opinion that the statute contemplates a formal proceeding before a forfeiture can be declared, at which the defendant is allowed to present all his defenses, and have a jury for their determination, if he desires. The proper practice is, therefore, to require a suggestion, made in open Court and entered upon the minutes of the Court, that the bond has been given and returned into Court and has been breached, and, upon this suggestion, which should be made at the instance of the District Attorney-general, the Court will, if it think proper, direct a *scire facias* to issue, returnable after ten days, requiring the defendant to appear and show

cause why the forfeiture should not be taken. A *scire facias* issued by the Clerk without the order of the Court is not sufficient.

The judgment of the Court below is affirmed with costs.

IN RE TURNER, TRUSTEE.

(*Nashville.* February 4, 1899.)

WILL. *Right to interest accruing on trust fund.*

Under a will that provides a specific fund shall be set apart and deposited in bank for the benefit of testator's widow, and his two daughters and their children, to be enjoyed by them in a prescribed manner, and not otherwise; and further provides that the widow and two daughters shall receive each $100 annually out of this fund so long as they shall live; and further provides that when they are all dead the children of each daughter shall take equally one-half the fund, the two daughters take the $100 per annum absolutely, and are not entitled to any part of the interest that may be earned by the fund during their lifetime. They are annuitants, not life tenants of the fund.

Cases cited: Forsey *v.* Luton, 2 Head, 184; Prichett *v.* Nashville Trust Co., 96 Tenn., 477; Whitworth *v.* Ewing, 15 Lea, 595; Stephenson *v.* Harrison, 3 Head, 729.

FROM CHEATHAM.

Appeal in error from Circuit Court of Cheatham County. W. L. GRIGSBY, J.

L. J. PARDUE and R. S. TURNER for Turner.

J. J. NAVE for exceptants.

CALDWELL, J. Abner Edwards died testate at his residence in Cheatham County, Tennessee. By the

fifth clause of his will, he set apart about $10,900 in money as a trust fund, and directed his trustee to deposit it in some safe and reliable bank for the benefit of his two daughters, Mary J. Stewart and Nancy A. T. Smith, their children, and his widow, to be enjoyed by them in a prescribed manner, and not otherwise. The direction to the trustee was, in effect, that he should pay from the trust fund to the testator's widow and two daughters each $100 annually, so long as they should live, and that, when they were all dead, he should divide that part of the trust fund remaining, if any, into two equal parts, and distribute one part equally among the children of one daughter, and the other part equally among the children of the other daughter.

The widow dissented from the will, and received, under the statute (Shannon, § 4172, Subsec. 1), one-third of the fund, as absolute owner. The trustee, R. S. Turner, took possession of the balance of the fund, about $7,270, and deposited it in bank, as directed by the will. For prudential reasons, he afterwards withdrew the money from the bank, and, to insure its greater safety, loaned it to responsible persons at interest. When he came to make his annual settlement with the County Clerk, he reported the amount of the fund received by him for the two daughters and their children, and, also, $646 interest collected thereon, treating the aggregate of the two sums as the true amount of the corpus of the trust fund. The two daughters filed exceptions

to this report of the trustee, claiming that the $646 of interest collected by him belonged to them, and should not have been treated as a part of the corpus of the trust fund. The Chairman of the County Court sustained these exceptions, and adjudged the daughters of the testator entitled to receive the $646 of interest in their own right, and in addition to the annuities provided for in the will. On appeal to the Circuit Court, the decree of the County Court was reversed, and the theory of the trustee's report was adopted and adjudged to be the correct one.

The excepting parties have appealed in error from the latter judgment, and in this Court they insist that they are entitled in their own right to receive and enjoy the $646 of interest earned by the trust fund. In this insistence they place themselves upon the same ground as life tenants of the fund bequeathed to them and their children by their father, the testator. If this view of their relation to the original fund be the correct one, then the legal result contended for by them would inevitably follow. It is well settled that the life tenant of property is entitled to its use, income, or increase during the continuance of the life estate. *Forsey* v. *Luton*, 2 Head, 184; *Prichitt* v. *Nashville Trust Co.*, 96 Tenn., 477. In the latter case the Court said: "When property is given to one person for life, with remainder to another, the former is entitled to the use for the period limited, and the latter to the corpus after that time. Neither may

encroach upon the right of the other. The life tenant may not dimish the corpus, nor the remaindermen the use, and what they may not do themselves others may not do for them. The life tenant may not be deprived of the use to augment the corpus, nor the remaindermen of the corpus to augment the use. The right to the use of the property entitles the life tenant to its net income. As applied to land, it entitles him to the crops or rents; as applied to money or bonds, it entitles him to the interest, and, as applied to corporate stock, it should, upon the same reasoning, entitle him to the net earnings.'' 96 Tenn., 477. But, in reality, the plaintiffs in error in this case are clearly not life tenants of the trust fund. The full measure of their interest in that fund, as distinctly defined by the will, is $100 each per annum during life. They are annuitants, nothing more, and hence their interests are limited by the amount named for annual payment. They are entitled to this from year to year, though the fund may earn nothing, and they are entitled to no more, whatever it earns.

In the present case the testator did not contemplate that the trust fund set apart by him should be loaned out at all, or that it should earn any interest. But that fact in no way affects the rights of his daughters, since his direction was that they should receive from the fund, annually during life, $100 each, no more and no less, and that direction has been complied with in proper time. Had the

annual sums due them been delayed by reason of the loan of the fund, they would undoubtedly be entitled to receive so much of the interest as was earned by such sums during the time of the delay. They assert no such claim, however, because there was no such delay.

A legatee of a particular fund is entitled to receive all interest earned by the loan of the fund, though the testator may not have contemplated the loaning. In such case the trustee will not be allowed to profit by loaning the fund, but the interest earned by it attaches itself to, and becomes a part of, the corpus, and as such, belongs to the legatee. *Whitworth* v. *Ewing*, 15 Lea, 595. The contention of the plaintiffs in error in the present case finds no support in this principle, however, because they are not legatees of the original fund, but are entitled to receive therefrom designated sums only, and that without reference to any income of the fund.

By the will considered and construed in the case of *Stephenson* v. *Harrison*, 3 Head, 729, the testator made provision for his widow, and directed that his slaves should be manumitted at her death. He also directed that a certain fund should be deposited in bank by his executors, and there kept until the death of his wife, and that it should then be used to defray the expenses of transporting his slaves to Liberia, and for an equal division of the balance among such of them as should go to that country. The executors did not keep the fund in bank, as

directed, but loaned and used it at great profit. This profit was claimed by the widow of the testator, who filed a bill in equity for a construction of the will and to recover in her own right the increase of the fund. For the slaves, her right was disputed, and it was contended that the profit followed the fund, and would ultimately pass with it to them. The Court said: "It was not the intention of the testator that this fund should be used by any one, but to remain in bank, securing (secure) for the slaves, at the death of the widow. And, if any profit was made upon it by the executors, it would constitute an addition to the fund for the same purpose. It was an accumulation that must go with the fund, whether made with or without authority. The trustees can have no benefit from it themselves, nor can it be separated from the fund for the benefit of any one else." 3 Head, 733. This holding is conclusive against the plaintiffs in error in the present case.

Turner, the trustee in this case, has acted in the utmost good faith and with sound judgment in respect to the fund intrusted to him. He claims no personal benefit from the use of the fund, or in the interest earned by it.

Affirmed.

WOODBURY *v.* BROWN.

101 707
110 659

(*Nashville.* February 9, 1899.)

MUNICIPAL CORPORATIONS. *Charter void.*

The charter of a municipal corporation is absolutely void, even on collateral attack, which is obtained without literal compliance with all of the essential requirements of Sec. 8, Ch. 121, Acts 1877, which provides that "no application or charter of incorporation for such town shall be registered, or, if registered, such application or charter shall be of no force or effect whatever, unless the certificate of the Sheriff or Deputy Sheriff holding said election shall be indorsed on the application and registered with it, and shall show the number of votes on said list, and that at least two-thirds thereof have voted in favor of the incorporation of said town."

Acts construed: Acts 1877, Ch. 121.

Code construed: § 1897 (S.).

Case cited and approved: Ruohs *v.* Athens, 91 Tenn., 20.

FROM CANNON.

Appeal in error from Circuit Court of Cannon County. GEO. S. RAMSEY, Sp. J.

F. M. SMITH, A. J. SMITHSON, J. R. WHARTON, and LILLARD THOMPSON for Woodbury.

BROWN & HANCOCK, JONES & PRESTON, and W. T. MINGIE for Brown.

CALDWELL, J. Brown was arrested, tried, convicted, and fined for the violation of an ordinance

of the town of Woodbury. He appealed to the Circuit Court, and was there discharged upon a plea in abatement, denying the validity of the corporate charter. From the latter judgment the town appealed in error to this Court, and here insists upon the validity of its charter.

This charter was sought and granted under Chapter 92, Acts of 1875, as amended by Chapter 121, Acts of 1877, and its validity or invalidity is to be determined by its conformity or nonconformity to the rule of procedure thereby prescribed. The statutory scheme, though not logically arranged or systematically developed, embraces certain important and general features, which may well be stated in the following order: 1. Preparation by intending applicants of a true and correct alphabetical and sworn list of the names of all persons who at the time would be qualified voters in municipal elections in the proposed corporation, and its deposit with the designated custodian for safe-keeping, public inspection, and correction by change, addition, or diminution of names pending notice of intended application and election (Acts of 1877, Ch. 121, Sec. 6; Shannon, §§ 1883–1889); 2. Delivery of corrected list of qualified voters to the Sheriff or his deputy on the day of election, and election held with only those on that list as voters (Acts 1877, Ch. 121, Sec. 7; Shannon, §§ 1890, 1891); 3. Report of election to County Court Clerk (Acts 1875, Ch. 92, Sec. 3; Acts 1877, Ch. 121, Sec. 3; Shannon, § 1893); 4. Presentation of appli-

cation to the Sheriff or deputy who held the election, and indorsement of his certificate thereon, if requisite number of votes were cast in favor of incorporation (Acts 1877, Ch. 121, Sec. 9; Shannon, § 1898); 5. Certification by Clerk of County Court to Secretary of State that all requisite preliminary steps have been taken (Acts 1877, Ch. 121, Sec. 3; Shannon, § 1895); 6. Issuance of charter in prescribed form by Secretary of State, and its registration in the county where the incorporated territory lies (Acts 1877, Ch. 121, Sec. 4; Shannon, §§ 1896, 1899); 7. An enumeration of corporate powers (Acts 1877, Ch. 121, Sec. 5; Shannon, § 1901); 8. Form of election certificate by Sheriff or deputy, and requirement that it be indorsed, on application, and that both be registered (Acts 1877, Ch. 121, Sec. 8; Shannon, §§ 1894, 1897).

Since the decision of the present case depends upon a construction of the particular language of the section last referred to, the part thereof to be considered will be quoted in full. It is as follows, to wit: "No application or charter of incorporation for such town shall be registered, or, if registered, such application or charter shall be of no force or effect whatever, unless the certificate of the Sheriff or deputy holding said election shall be indorsed on the application and registered with it, and shall show the number of voters on said list, and that at least two-thirds thereof have voted in

favor of the incorporation of said town." Sec. 8, Ch. 121, Acts 1877.

It is readily observed, from this language, that no municipal charter can be of any legal "force or effect whatever," unless three prerequisites therein mentioned have been observed. The first of these prerequisites is that the certificate of the Sheriff or deputy holding the election shall be indorsed on the application. The second is, that the application, with the certificate so indorsed, shall be registered; and the third is, that the certificate shall show the whole number of names on the corrected list of qualified voters (required by Sec. 6 of the same Act), and that at least two-thirds of those whose names appeared on that list have voted in favor of the incorporation of the proposed town. It was held in *Ruohs* v. *Athens*, 91 Tenn., 20, that the charter of the town of Athens was void because the first and second of these requirements had not been observed.

The present record discloses the fact that no one of the three was complied with in procuring the charter in question. It shows that the certificate of the Sheriff holding the election was not indorsed upon the application, and that the application and certificate were not properly registered, and that only 71 of the 146 persons whose names appeared on the corrected list of qualified voters cast their ballots in favor of the incorporation. The certificate shows 146 qualified voters on the list; that 71 of these voted for incorporation, and 35 of them against in-

corporation, and that the balance did not vote at all. From these figures, it is seen that one more than two-thirds of those actually voting favored incorporation. But that does not satisfy the imperative requirement of the statute, which is that two-thirds of all those whose names appear upon the corrected list, and not merely two-thirds of those voting, shall cast their ballots in favor of incorporation before the charter can be lawfully granted. It results, therefore, that the charter under consideration is fatally defective in each of the three particulars mentioned, and that the defendant, Brown, was rightfully discharged.

Affirmed, with costs.

REEVES *v.* HAGER.

(*Nashville.* February 25, 1899.)

1. WILLS. *Disinheriting an after born child.*

A married woman's will, that gives her entire estate to her husband, operates to disinherit her child born after its execution, even if § 3925, Shannon's Code, shall be held to apply to the will of a mother, a question not decided. (*Post, pp. 715–717.*)

Code construed: § 3925 (S.); § 3033 (M. & V.); § 2193 (T. & S.).

2. SAME. *Innocent purchaser.*

That a married woman's will gives her entire estate to her husband, to the exclusion of her infant children, is not a disposition of her property so unnatural as to put a purchaser of the property from the husband on his guard, and affect him with notice of an infirmity that would justify the setting aside of the will and deprive him of the character of an innocent purchaser. (*Post, p. 717.*)

3. SAME. *Purchaser may rely upon probate.*

A purchaser from a devisee, under a will that has been admitted to probate in common form, cannot be deprived of his character of innocent purchaser by reason of the unusual nature of the provisions of the will, so long as its probate is not assailed. (*Post, p. 717.*)

Case cited and approved: Brown *v.* Brown, 14 Lea, 257.

4. SAME. *Collateral attack of judgment setting will aside.*

The averment in an answer, that the probate of the will under which defendant's vendor acquired title to the property sued for had been set aside by a fraudulent and collusive contest between himself and the complainants, his children, is a collateral attack upon said proceedings that cannot be made without cross bill. (*Post, p. 717.*)

Cases cited: Conway *v.* Brown, 5 Heis., 237; Griffith *v.* Association, 100 Tenn., 412.

Reeves *v.* Hager.

5. SAME. *Equal equities of innocent purchaser and heirs.*

The equities are equal between an innocent purchaser from a devisee under a will probated in common form and heirs of the testator, who, subsequently and before attaining their majority, contest and set aside the will. In such case the purchaser must support his equity with a legal title or better right. (*Post, pp. 717, 718.*)

Cases cited: High *v.* Batte, 10 Yer., 334; Smitheal *v.* Gray, 1 Hum., 491.

6. SAME. *Superiority of purchaser's title over heir's rights.*

The purchaser who, in good faith, takes an absolute deed from a devisee and pays full price for the property, in ignorance of any infirmity in the will or of other defect of title, obtains a title superior to any right or claim of an infant heir, who, subsequently and before attaining his majority, enters a contest and has the probate in common form set aside and the will annulled. (*Post, pp. 718–722.*)

7. SAME. *Effect of probate in common form.*

The probate of a will is a proceeding *in rem*, and operates upon the subject-matter. Probate, even in common form, so long as it remains in force, binds all parties, whether adults or minors, and is conclusive of testamentary character of instrument, testamentary capacity of testator, due execution of the will, and as to all questions of fraud, imposition, and undue influence affecting the work. (*Post, pp. 718–720.*)

Cases cited: Williams, *ex parte*, 1 Lea, 529; Brown *v.* Brown, 14 Lea, 257; Rogers *v.* Winton, 2 Hum., 178; Franklin v. Franklin, 91 Tenn., 129; Trafford *v.* Young, 3 Tenn. Ch., 501.

FROM TROUSDALE.

Appeal from Chancery Court of Trousdale County. J. S. GRIBBLE, Ch.

E. T. SEAY and W. C. DISMUKES and S. F. WILSON for Reeves.

J. J. TURNER, JOHN S. MCMURRY, W. B. HALE, J. T. MILLER for Hager.

WILKES, J. The bill in this case is filed to assert the right of complainants to a certain parcel of land in Hartsville, now in possession of and claimed by defendant. The only defense insisted on in this Court is that the defendant is an innocent purchaser. He was so held by the Chancellor and the Court of Chancery Appeals, and the appeal to this Court is by the complainants, who are the only heirs at law of Mrs. Martha Reeves, and claim by descent from her. The defendant claims as innocent purchaser from A. S. Reeves, Sr., the husband of Mrs. Martha Reeves, who held under a will of his former wife. Mrs. Reeves died in November, 1879, the owner of the real estate in question. After her death a will purporting to have been executed by her April 1, 1878, was probated in common form in the County Court of Trousdale County. By this will she devised all her property, including the real estate in controversy, to her husband, A. S. Reeves, Sr., the father of complainant. At the time of her death she left two children, W. Hart Reeves, aged about four years, and A. S. Reeves, Jr., aged about four weeks. After her death and the probate of the will, her surviving husband, A. S. Reeves, Sr., assuming to be the owner in fee under her will of her real estate, sold the parcel in controversy to defendant, Hager, in 1885. In 1893, while the children were both minors, they instituted proper proceedings to

set aside the will of their mother, on the ground that it had been procured by fraud and undue influence, and that the wife and mother was of unsound mind. After a fierce contest the will was set aside, and, on appeal to this Court, the decree setting it aside was affirmed.

The bill in this case was then filed to assert the rights of the children to the land, the older having reached majority, filing it in his own right and as next friend for his minor brother. It is not contended that the defendant, when he purchased, had any reason to question the title which he was acquiring, and it is conceded he believed that the husband, A. S. Reeves, Sr., had and could make a good title under the will of his wife, then of record.

The question presented and argued with much force in this Court is whether, under these facts, the defendant can be held to be an innocent purchaser, and entitled to hold the land against the heir as the true owner after the probate of the will is set aside. As preliminary, or collateral, to the main question, it is insisted that A. S. Reeves, Jr., having been born after the making of the will by the mother, and not being by it expressly disinherited, was only pretermitted in the will, and took a share in the testator's estate to the same extent as if she had died intestate, and this share did not, therefore, pass to the husband, and could not pass to his assignee. The statute (Shannon, § 3925), provides: "A child born after the making of a will,

either before or after the death of the testator, not provided for nor disinherited, but only pretermitted in such will and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate."

We are of opinion that the testatrix intended by the provisions of her will to disinherit her children, whether born or unborn, in favor of her husband, if he survived her, and to provide for all equally if she survived him. There need not be an express clause of disinheritance to bring the case without the operation of the statute, but it may result as an unavoidable inference. The will provided that the property should go to the husband if he survived his wife; otherwise, to her bodily heirs. This necessarily means that, if the husband survives, he was to take the entire estate to the exclusion of the child or children; if he did not, the children, born or unborn, were to take. In the event the husband took, the child was not pretermitted, but both those born and those unborn were excluded. The Act of 1823, Ch. 28, from which this section is derived, related expressly to after-born children of a father alone and not to those of a mother; and the language of the statute, as now found in the Code, necessarily bears the same limitation and construction, as it uses the language "a child born after the making of a will, either before or after the death of the testator," and it could not be supposed that

a child could be born after the death of the mother. It is questionable, therefore, whether the after-born child of a mother is embraced by the terms of the statute at all.

It is said that the will upon its face is suspicious and its provisions enough to put purchasers on their guard. We are unable to take this view of the case. Upon its face the provisions of the will are entirely natural, and, even if they were not, it would have been immaterial so long as the probate was not attacked. *Brown* v. *Brown*, 14 Lea, 257.

It is insisted for defendants that the proceedings to set aside the probate of the will of Mrs. Reeves were collusive between the father and children, and that in fact the will was a good one and should never have been set aside. We think this contention can avail the defendants nothing, as it is simply set up in their answer, and not by cross bill, and, at most, can only be treated as a collateral attack upon these proceedings, and defendants can receive no benefit therefrom. *Conway* v. *Brown*, 5 Heis., 237; *Griffith* v. *Association*, 16 Pickle, 412.

The real question in the case is, whether the will of Mrs. Reeves, admitted to probate in common form and remaining unattacked from 1879 to 1893, will support a plea of innocent purchaser in favor of a party who bought, in 1885, from the devisee under such will. The defendant, as purchaser, it is conceded, paid full value, took an absolute convey-

ance, and believed he was getting a good title, and knew of no facts invalidating the will. On the other hand, the complainants were all the while minors, and, before they reached their majority, set the will aside, as a nullity, by formal proceeding. The equities of the parties appear thus to be equal, and the purchaser in such case must support his equity with a legal title or better right. *High* v. *Batte*, 10 Yer., 334; *Smitheal* v. *Gray*, 1 Hum., 491.

The question presented is, Did the defendant, Hager, under the facts stated and the law applicable thereto, acquire such a title to the property, by the conveyance from the husband, as would defeat the title of the heirs? A probate of a will is a proceeding *in rem*, and operates upon the subject-matter in controversy, and, though in common form, is binding upon all parties, whether adults or minors, until the probate is set aside by a proper proceeding and in a proper manner. Under the rulings of our Court, whatever may be the rule in other jurisdictions, in the absence of fraud or collusion, a probate in common form is conclusive until annulled, both as to the capacity of the testator and as to the testamentary character of the instrument and its due execution, and not even a court of chancery can inquire into these features, even though fraud and undue influence in procuring the will is alleged. Pritchard on Wills, Sces. 44, 380, and authorities there collated.

The case of *Williams, ex parte*, 1 Lea, 529, illustrates forcibly the extent to which the doctrine is carried. In that case there was a will by a minor under sixteen, and it was held void for want of testamentary capacity. Still, while holding the will void for want of power to make it, the Court nevertheless held it valid as long as the probate remained in force, and the probate was held conclusive of capacity as well as of due execution.

The case of *Brown* v. *Brown*, 14 Lea, 257, holds that the probate of a will of personalty is conclusive (if the Court had jurisdiction) not only of its testamentary character, but of the capacity of the testator, and as to all questions of fraud, imposition, and undue influence, until set aside in the mode prescribed by law, and the judgment of probate, like other judgments, would protect the purchasers of property under it, notwithstanding a subsequent reversal, unless the title can be impeached for fraud. The title is valid by virtue of the probate, and therefore not void, but voidable. It is true this case only relates to wills of personalty, and the case of *Williams, ex parte*, only relates to the title of the devisee while the probate is in force, but they settle the principle involved in this case.

To the same effect is the case of *Foulke* v. *Zimmerman*, 14 Wall., 113, and the case of *State* v. *Renn*, 50 Tex., 467, in which latter case the will was a forgery, and was so declared and set aside, and yet the Court held the party who bought from

the devisee entitled to protection as an innocent purchaser. As bearing upon this question we refer also to the cases of *Rogers* v. *Winton*, 2 Hum., 178; *Trafford* v. *Young*, 3 Tenn. Chy., 501; *Franklin* v. *Franklin*, 7 Pickle, 129.

The case of *Thompson* v. *Samson*, 64 Cal., 330, is directly in point. In that case it was held that when the probate of a will had been annulled by the heir subsequent to an entry of decree for distribution, the heir may pursue the property in the hands of the legatee, but not into the hands of an innocent purchaser in good faith, and for value, from the distributee, prior to the revocation, and at a time when the proceedings were valid and binding.

The statutes of California and the holdings of the Court thereunder are very similar to the law as laid down in Tennessee, except that under our rulings a probate in common form does not require notice to the heirs or distributee, but is binding without notice, and whether they are adults or minors, until set aside by proper proceedings. In our State there is no express limitation of time within which a contest may be made of a will, even though it may have been probated in common form; so that a holding different from this would make it practically impossible to make an indefeasible title to property devised, inasmuch as the will may be at any time set aside and titles acquired thereunder may be questioned. Not only the title of the legatee or devisee would remain indefinitely defeasible, but so

would that of the executor and of a purchaser, although he may have bought in good faith and paid full values. We are cited to the case of *Fallen* v. *Chidester*, 46 Iowa, 588 (S. C., 26 Am., Rep., 164), as holding a contrary doctrine. This is true, but the decision in that case turns upon the provisions of the statutes of Iowa then in force, which gave to the probate of a will no further effect than to establish its execution and render it admissible in evidence in the courts, and nothing more. Such probate in Iowa did not establish the testamentary character of the instrument, and hence did not give validity to a title based upon it. We have also examined the case of *Hughes* v. *Burris*, 85 Mo., 660, which is directly in point, in favor of the contention of the complainant. It will be seen, however, that this case also rests upon the provisions of the statutes of Missouri, which do not make the action of the Probate Court final and binding on the parties interested while it is in force, etc., and especially as to persons under disability, until five years after probate in case of adults, and the same time after the disabilities are removed of others affected.

We are of opinion, therefore, that under the deed of A. S. Reeves, Sr., the defendant, Hager, can claim as an innocent purchaser, and is entitled to be protected as such, even though the complainants were minors when the will was probated in common

form, the defendant having bought in good faith, having paid full price, and in ignorance of any defect in title or irregularity in the will. The decree of the Court of Chancery Appeals is, therefore, affirmed.

PREWITT *v.* BUNCH.

(*Nashville.* March 15, 1899.)

1. HUSBAND AND WIFE. *Husband's right to wife's property and effects.*

As a result of marriage the husband is entitled at once to the wife's property in her possession, and to reduce her choses in action to possession, including her distributive share and her funds in the hands of her guardian, and make them his absolute property. (*Post, pp. 734, 735.*)

Cases cited: Lane *v.* Farmer, 11 Lea, 568; Wade *v.* Cantrell, 1 Head, 345; Hollingsworth *v.* Mith, 5 Sneed, 472; Cox *v.* Scott, 9 Bax., 305; Allen *v.* Walt, 9 Heis., 242; Joiner *v.* Franklin, 12 Lea, 422; Handwerker *v.* Diermeyer, 96 Tenn., 619; Rice *v.* McReynolds, 8 Lea, 36; Sanders *v.* Forgasson, 3 Bax., 249; Jones *v.* Ward, 10 Yer., 168.

2. SAME. *Husband takes wife's choses in action upon her death.*

The husband, upon death of the wife, takes, either as next of kin or *jure mariti*, the choses in action of the wife which were not reduced to possession in her lifetime. (*Post, p. 736.*)

Cases cited: Hamrice *v.* Laird, 10 Yer., 222; Tune *v.* Cooper, 4 Sneed, 296.

3. SAME. *Guardianship of wife ceases on her marriage.*

Upon marriage the guardianship of the wife ceases, and her husband becomes entitled to receive or recover her funds from her guardian, even during her minority. (*Post, pp. 735, 736.*)

Cases cited: Jones *v.* Ward, 10 Yer., 168; Lane *v.* Farmer, 11 Lea, 568.

4. SAME. *Rights of, not changed by taking land in compromise of guardian's liability, when.*

The joint suit of husband and wife against her guardian for her personal funds was compromised, and settled by the guardian's conveyance of land to the wife. The husband assented to the compromise, but objected to the terms of the deed.

Thereupon it was agreed and decreed that the deed should be accepted in full satisfaction of the guardian's liability, but that it should not have the effect to exclude or in any manner affect the husband's marital rights, which, with the wife's right to an equity in the property, were reserved for future determination. It was declared to be the purpose of the decree to preserve the legal and equitable rights of the husband and wife "as respects said land." *Held:* That the land conveyed to the wife, in satisfaction of her guardian's liability, was to be treated precisely as a joint recovery of money would have been treated in fixing the rights of husband and wife therein. (*Post, pp. 736–740.*)

5. SAME. *Husband's right not defeated by laches.*

In such case the husband's delay for a period of eight years, and until after the wife's death, to assert, by suit, his rights to the property, will not repel him on the ground of laches, where it appears that his rights have not been satisfied or abandoned; that the evidence thereof is matter of record, and that the delay was for the promotion of family harmony. (*Post, pp. 740–743.*)

6. SAME. *Descent cast does not defeat husband's rights.*

Nor does the husband's delay, in such case, until descent cast upon the wife's death operate to defeat his claim. (*Post, pp. 743, 744.*)

7. SAME. *Wife's equity to settlement.*

The wife's entire estate may be settled upon herself and children, but the application, which may be made in her behalf by any person, must be made in her lifetime and before reduction of her property to possession by the husband. (*Post, p. 744.*)

Cases cited: Phillips *v.* Hassel, 10 Hum., 197; Pillow *v.* Thomas, 1 Bax., 122; Dearin *v.* Fitzpatrick, Meigs, 559; McCaleb *v.* Crichfield, 5 Heis., 288; Murphy *v.* Green, 2 Bax., 403.

8. SAME. *Same.*

The amount which a court of equity will set apart for the benefit of a wife and her children out of her estate before its reduction to possession by the husband, will be limited over to her husband upon the contingency of her death without issue. (*Post, pp. 744–747.*)

Prewitt *v.* Bunch.

9. LACHES. *Rule.*

In order that laches, inferable from long delay and its natural consequences of loss of evidence, etc., shall be effectual to defeat a suit, the circumstances must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim sued on. (*Post, pp. 741, 742.*)

Cases cited: Bolton *v.* Dickens, 4 Lea, 577; Parker *v.* Bethel Hotel Co., 96 Tenn., 252; Lafferty v. Turley, 3 Sneed, 157; Hammond v. Hopkins, 3 Yer., 525; Coldwell *v.* Palmer, 6 Lea, 658.

10. ABANDONMENT. *What constitutes.*

To constitute an abandonment, or waiver, there must be a clear, unequivocal, and decisive act of the party showing a determination not to have the benefit in question, with a full knowledge of his rights in the premises. (*Post, p. 742.*)

Cases cited: Gentry *v.* Gentry, 1 Sneed, 87; Traynor *v.* Johnson, 1 Head, 52; Masson *v.* Anderson, 3 Bax., 290.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. H. H. COOK, Ch.

J. C. BRADFORD and A. W. STOCKELL for Prewitt.

VERTREES & VERTREES and E. H. EAST for Bunch.

McFARLAND, Sp. J. The original bill in this case was filed on the twenty-fourth of August, 1886, by Austin L. Prewitt and his wife, Amanda S., against W. H. Bunch, her guardian, for an accounting by

him as guardian and decree for a large amount alleged to be due his ward, Amanda S. Pending this litigation, there was a compromise settlement made in 1887, by which the guardian conveyed to Mrs. Amanda S. Prewitt certain real estate in Nashville by deed duly registered. The conveyance was to the wife's sole and separate use. The title to the real estate continued in the wife until her death, which occurred in June, 1895. She died without issue, but leaving a will by which she devised all her estate to her half-brothers and sisters. She had other property besides this she held under this conveyance from Bunch. Soon after the death of the wife Mr. Bunch qualified as her administrator.

In July, 1895, complainant, A. L. Prewitt, the husband, by leave of Court, filed an original bill in the nature of a supplemental bill, and bill of revivor to the original bill filed against W. H. Bunch in 1886. The complainant sought, in this bill, to have decided his rights as husband in the real estate conveyed by Bunch to Mrs. Prewitt. This cause was heard by the Chancellor and the bill was dismissed by him, from which Prewitt appealed, and the Court of Chancery Appeals affirmed the Chancellor's holding. Judge Neil, however, dissented.

This cause was heard by this Court upon full argument at the December term, 1898, but no conclusion was reached by the Court, and it was remanded to the docket for argument at the present term, and has been again most ably presented by

eminent counsel on both sides with elaborate printed briefs.

A more detailed statement of facts is found in the opinion and findings of the Court of Chancery Appeals. Says the Court: "Before coming to and deciding what we deem the vital and controlling question in the case, we think it proper to state, in a brief manner, the controlling facts appearing in the record leading up to the compromise decree of November 20, 1887. Many years ago a Mr. McKissick died in Maury County intestate, possessed of a large estate, consisting of both realty and personalty, and leaving his wife and an infant daughter surviving him. A few years after his death his wife married Dr. W. H. Bunch, and, soon after the marriage, he became the guardian of his stepdaughter, known in the record as Susie McKissick. During her minority Susie McKissick married the complainant, who was then a young lawyer at the Columbia bar. Soon after the marriage they filed a bill in the Chancery Court at Nashville against Bunch, as her guardian, and his wife, and his surety on his guardian bond, for the purpose of making Bunch account for her estate that went into his hands as guardian, alleging that he had abused his trust; that he had made false settlements as her guardian; that he had squandered her estate; that he had overcharged her for board and as compensation in his settlements; that he had invested largely of her means in real estate, the title to which had

been taken to his wife, and other perversions of his trust. A writ of attachment issued under the bill, and was levied upon the real estate in which it was alleged the means of the ward had been invested, and an injunction, also, issued to enjoin the guardian and his wife from disposing of the property. Messrs. East & Fogg, as solicitors, filed this bill for the husband and wife. Bunch and wife, and the other defendants to the bill, answered; but it is needless to state the contents of their answer, further than to say that Bunch denied he had acted in bad faith, or dishonestly or negligently, in the administration of his trust as guardian.

"After considerable proof had been taken in the case, negotiations began, looking to an adjustment of the claim against the guardian, and the husband participated in these first negotiations; for it appears that he prepared deeds, to be signed by Bunch and wife, to several pieces of real estate, conveying them to his wife, to her sole and separate use. These negotiations fell through, and about this time, or just before, it appears that an estrangement took place between the husband and wife, resulting in their temporary separation; and about this time, or just before, he quit the practice of law, and went into the insurance business, and soon thereafter became a minister of the gospel, connecting himself with the ministry of the Methodist Episcopal Church, South. Soon after the negotiations fell through, the wife of complainant arrived at age, when, through

her counsel, Judge East, negotiations led to the settlement with the guardian embodied in the compromise decree of November 20, 1897. It appears that, at the time of the settlement embodied in the deed from Bunch and wife to Mrs. Prewitt, and set out in the said decree, was entered into, Mrs. Prewitt and her husband were in a condition of estrangement and were not living together. Judge East, it appears, in view of this status, notified Mr. Prewitt that affairs had reached a stage where he could not represent both him and his wife, and suggested that he get him a lawyer to represent his interests, and thereupon complainant engaged Mr. Figures, of Columbia. The decree recites his appearance in the case, and his objection to the deed that had been prepared and registered as evidence of the settlement of Bunch's guardianship.

"We do not deem it at all essential to the decision of this case to go into any discussion of the evidence of what was said and done when Mr. Figures appeared in the case, aside from what appears in the decree, further than to say that it is manifest from the evidence, as well as the decree itself, that Mr. Figures, representing the husband, tried to get the decree so worded and shaped as to get all he could for his client, and that the counsel for the wife tried to give as little standing ground as possible, all parties agreeing, however, that an acceptance of the land was the proper thing to do, under

the circumstances, in satisfaction of the demands against the guardian."

This decree of November 20, 1887, after setting out the deed of Bunch to Mrs. Prewitt, proceeds as follows: "The Court, being informed in open Court by complainant, A. L. Prewitt, through his solicitor, that said Prewitt objects to said deed, but is willing that said property should be taken in full settlement of all claims against said Bunch and his sureties for the amount due from them, or either of them, as such guardian and sureties, and it further appearing to the Court that said deed was registered before the same had been acted upon by the Court, and prematurely, and it is agreed that it shall have the effect and operation of a full settlement of all matters arising out of the guardianship, as between complainants and defendants, but that it, and nothing therein, shall have the effect to exclude the marital rights of said Prewitt, as husband, or in any manner affect the same, but that the property therein specified shall stand open to the determination hereafter to be had between complainants, in such manner as they may see fit to raise the same, as to whether he has any marital rights therein, and the right of the Court to determine her equity as respects said property, it being admitted that the cause of action was through her and by virtue of her rights against said guardian and his sureties. It is definitely agreed and understood between all parties that the effect of this decree shall be to preserve

the legal and equitable rights of complainants, as between them, as respects said land, and especially to discharge said Bunch and his sureties. And it is especially agreed by the parties and decreed by the Court that Messrs. East & Fogg, solicitors for complainants, shall have a lien upon the lands and recovery, whether it be real or personal property, for a reasonable fee. It is further ordered that the Clerk and Master retain the costs of this cause out of any money in his hands as receiver of said lands, and accruing from the rental thereof, and that this cause stand upon the docket for further action of either party complainants, as respects their alleged rights as between themselves.''

The Court of Chancery Appeals says, further, in its opinion and as part of its findings: "Beyond dispute, land was taken in satisfaction of the debt due from the guardian to the wife, in the joint suit of the husband and wife against the guardian and his sureties, and it was deeded to the wife, with the husband's assent. He left her in possession of it, and the management of it and the control of its uses to her, until her death, more than seven years after the decree. He did not take actual possession of the property, nor did he pretend to hold it in his own right alone. Manifestly, he intended, for his acts as well as his declarations so declare, that the property, in the shape it was, should remain in the wife.''

Upon petition asking for rehearing of the facts

found, the Court says, as to who controlled the real estate after the decree of 1887: "We think the clear weight of proof shows that Mrs. Prewitt managed and controlled this property after the decree in 1887. The husband states that he was willing for it to remain, as the decree fixed it, as an investment. While he, in some instances, may have received some of the rents of the property, the proof, we think, clearly shows that Mrs. Prewitt controlled the property and made all contracts, or all the contracts material to its management and preservation."

There were other matters in the record as to the marital relations of Mr. and Mrs. Prewitt, and the influence of her family upon her with respect to her conduct to her husband, and as controlling her as to the execution of her will excluding her husband; and the Court of Chancery Appeals found the facts bearing upon this relation of husband and wife, "not," they say, "because we think they have any legal bearing upon the settlement of the real questions in the case, but because they are in the record," etc. We concur they have no real bearing upon the substantial questions in the case, and omit these facts and findings from this opinion.

The real question in this case is, what was the legal effect of the deed by Bunch, the guardian, to his ward, Mrs. Prewitt, in 1887, and the decree entered on the twentieth of November, 1887, upon the marital rights of the husband to the funds in the hands of the guardian, Bunch? And what ef-

fect the acts of the husband, as found by the Chancery Court of Appeals, in permitting this real estate to be taken in the name of his wife, and then so to remain under her control for over seven years, had upon his marital rights?

The contention of complainant, as found in the pleadings and condensed in his assignment of errors, is that the conveyance of the land by Bunch to Mrs. Prewitt, and decree of November 20, 1887, was intended as a mere settlement of the controversy between the guardian and ward; that they did not convert this personalty to realty, and that the same right possessed by him in the personal estate of his wife, in the hands of her guardian or in a suit or action brought by him, extended to and inhered in the land conveyed.

The contention of defendant is that the husband agreed that land should be taken for the debt, and this worked a conversion of this personalty into realty, which, upon her death, went, under her will, to her devisees, and, dying without issue, the husband took no interest in the land; that the reservations made in the decree in favor of the husband, were reservations of his marital rights in land—*quasi* land—and in exclusion of the idea of any question of its being personalty; that, by his laches in not asserting his rights during the life of the wife, he lost whatever right he had; and that, even if the decree did stamp the property as personalty, the complainant should have asserted his rights to it,

as personalty, before its descent as land, and that the complainant should be repelled, because, had he asserted his rights in this property during the life of the wife, her equity to a settlement to the extent of the whole property would have been decreed; and in this connection it is contended that, by the admissions of his bill, this equity was preserved.

In determining these questions thus presented, we concur with the Court of Chancery Appeals, that some of the principles involved are too well settled to need an elaborate citation of authorities, but it is well to refer to some of these principles. One is, that, at common law, upon the marriage, the husband becomes entitled, at once, to all the personal property of the wife in her possession. 2 Kent Com., 143. It is equally well settled that the husband may reduce the wife's choses in action to possession during coverture, and thus make them his absolute property. So it is settled that upon the marriage of Miss Susie McKissick and the complainant, the guardianship of Bunch for the former at once ceased, and, upon the marriage, the husband becomes clothed with the right to demand and sue for the distributive share of his wife in her father's estate, or for any funds in the hands of her guardian. *Lane* v. *Farmer*, 11 Lea, 568, and authorities cited.

Personal property in possession, and the possession of the wife in such cases is the possession of the husband, is, in law, the property of the husband, nothing else appearing to show a separate

property of the wife. *Wade* v. *Cantrell*, 1 Head, 345; *Hollingsworth* v. *Mith*, 5 Sneed, 472; *Cox* v. *Scott*, 9 Bax., 305.

The general principle of the common law is that marriage amounts to an absolute gift to the husband of all personal goods of which the wife is actually or beneficially possessed at the time, or which comes to her during coverture. *Wade* v. *Cantrell*, 1 Head, 345; *Allen* v. *Walt*, 9 Heis., 242; *Joiner* v. *Franklin*, 12 Lea, 422; *Handwerker* v. *Diermeyer*, 96 Tenn., 619, 627.

The common law rule that the husband in entitled to receive and reduce to possession, during coverture, all choses in action, whether in the form of notes, debts, or legacies, belonging to the wife at the time of their marriage, or accruing afterwards, prevails in Tennessee. *Rice* v. *Reynolds*, 8 Lea, 36, 37.

Where money of the wife is in the hands of her guardian, the latter may settle with the husband and pay him the money due. *Sanders* v. *Forgasson*, 3 Bax., 249; *Lane* v. *Farmer*, 11 Lea, 568, 572.

The fact that the wife is a minor at the time of marriage makes no difference, for, upon marriage of a female ward, guardianship ceases. *Jones* v. *Ward*, 10 Yer., 168.

From that time the husband becomes clothed with the right to demand, receive, and sue for the distributive share of his wife in her father's estate, or for any funds in the hands of the guardian. The

guardian might settle with him and pay him the money due the wife. *Lane* v. *Farmer*, 11 Lea, 568, 572.

It is also well settled that if, for any reason short of abandonment of these fixed and vested rights by the husband, the wife dies before reduction to possession, the choses in action go to the husband, and whether this be as next of kin or *jure mariti* is immaterial. Williams on Exec., 242; 2 Kent Com., 137; *Hamrice* v. *Laird*, 10 Yer., 222; *Tune* v. *Cooper*, 4 Sneed, 296.

This last is an important principle as applicable to this case. This relieves of the consideration of the question of whether or not the act of the husband in suing, though jointly with his wife, for the choses in action, and actually receiving the fund, though in the shape of realty, was not, in legal effect, a reduction to possession, for, if it went to the husband *jure mariti*, upon the death of the wife, though not reduced to possession, the same result follows.

Recurring, then, to the main question, as to the intention and legal effect of the deed by Bunch to Mrs. Prewitt, and decree of November 20, 1887, we are of opinion, from the plain reading of the decree itself, and the facts as found by Chancery Court of Appeals, that the intention and legal effect of this decree was, as between the husband and wife, to leave this claim just as it was before the execution of the deed, and that the taking of the land

was merely a settlement with the guardian. This is arrived at by construing this decree by the ordinary rules of construction, as applicable to every decree or contract, by considering the surroundings of the parties at the time; by construing the instrument as a whole; and, particularly, by taking the plain and unambiguous language of the instrument itself. The purpose of the pleadings and decree was the collection of the fund in the hands of the guardian. The husband and wife were suing jointly for this alone. There was no question between the husband and wife—no litigation or issue between them. The deed to the land was taken and recorded in the absence of the husband. He objected to it at once. There is no finding that he objected to it solely because it was to the sole and separate use of the wife, but the finding is that he objected to it in its entirety, and the inference is fair that he objected to it as much because it did not in terms provide for the preservation of his rights to this property as personalty, as well as the presence or absence of any other terms affecting his rights. The decree itself shows Prewitt "objected to said deed," not to the portions alone which conveyed to her sole and separate use, but to the deed in its entirety.

Taking the decree as a whole, its evident purpose was to preserve all his rights to this property, as between husband and wife, just as it stood before the deed. Looking to the plain and unambiguous terms of the decree itself, the intent to pre-

serve all the rights of the husband seems to be clearly provided for. The language is, "that its [the deed] terms, and nothing therein, shall have the effect to exclude the marital rights of said Prewitt as husband, or in any manner affect the same." This language is as broad and comprehensive as could have been used by Prewitt's solicitor to preserve "all" his rights. An attempt to have specified what particular rights were preserved would have limited his rights, perhaps, to those specially enumerated, under the well-known rule of "*expressio unius est exclusio alterius.*"

The finding of the Court of Chancery Appeals is that the solicitor, "Mr. Figures, representing the husband, tried to get the decree so worded and shaped as to get all he could for his client." That the possible legal effect of this deed and decree was in the minds of respective solicitors, we find that the attorney's lien for fees was preserved whether the property "be real or personal property." This demonstrates that the parties to the decree had not admitted it to be land, nor the Court so declared.

The following clause in the decree is relied upon by learned counsel for defendant: "It is definitely understood and agreed between all parties that the effect of this decree shall be to preserve the legal and equitable rights of complainants, as between them, as respects said land, and especially to discharge said Bunch and his sureties." It is contended, with

much iteration and ingenuity, that the use of the term "as respects said land" is, in effect, an admission that the conversion was complete, and that the husband would henceforth treat this as land. This construction is, in our opinion, too narrow. The consequences are too extended and momentous to be warranted by this simple designation of the property in controversy as land. It is to limit a plain reservation, in a previous clause, of all his marital rights, which he then had, to only such as he would have in land. There was too great a distinction between all his marital rights and only such as might be claimed in land. In one he would have the whole estate, subject only to such equity as might be set apart to the wife for life; in the other only a life estate to himself, and contingent then to loss of whole if she died without issue.

We are of opinion that this expression, "as respects said land," was a mere designation by its proper name—"land"—of what the property then was, and was not intended as determining between the parties the legal effect of its being land. Our conclusion is, that it was not the intention of the parties, nor the legal effect of this transaction, to convert this money into land, but that it remained, after this deed and decree, a mere chose in action, as between the husband and wife.

If our conclusions as to the intention of the decree be correct, in holding that the parties, by this decree, preserved the personal character of this prop-

erty, then it is useless to discuss the abstract question of conversion, or what would have been the effect as to conversion by operation of the deed itself in the absence of decree; for, if the parties did not intend there should be a conversion, then, of course, there was none. In fact, learned counsel for defendant admits that this doctrine of conversion has no application in this case.

The next contention of the defendant is, that even though it was, as between the husband and wife, a chose in action, he lost his rights by laches, both upon the general principles applicable to the doctrine of laches and because there had been a final descent of the land before action begun. We have considered the authorities on the doctrine of laches submitted by learned counsel. The application of the doctrine of laches is for certain important reasons. This Court, in the case of *Bolton* v. *Dickens*, 4 Lea, 577, says: "The reasons upon which Courts refuse relief because of the lapse of time, are, in part, that the loss of papers, death of parties and witnesses, and the failure of memory, involve the transaction in so much obscurity and uncertainty that any attempted settlement will fall far short of reaching the truth, and may do injustice."

In *Mackall* v. *Casilear*, 137 U. S., 556, the Court says: "Where the difficulty of doing entire justice, by reason of the death of the principal witness or witnesses or from the original transaction having been obscured by time, is attributable to gross neg-

ligence or deliberate delay, a Court of Equity will not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence." Citing a number of cases.

Mr. Pomeroy says the doctrine applies to cases against conscience or public convenience, and where the party has slept upon his rights for a great length of time. Conscience, good faith, and reasonable diligence are the requisites. Pom. Eq., 419, and cases. "Laches cannot be invoked against a party unless conditions have changed, and some innocent party, without knowledge of his rights, has become involved in the matter, and is about to suffer loss by reason of his neglect." See *Parker* v. *Bethel Hotel Co.*, 12 Pick., 252.

The present case is not a controversy with innocent holders for value. This makes a great difference. Defendants occupy the same position with reference to this question that the wife herself would occupy were she living and the controversy with her. They are in law but volunteers. In equity lapse of time is not a bar to relief if a party can show good reason for not having acted. There it is only used as a witness to disprove the claim, and, even after twenty years, the Courts will sustain a just claim, if the delay is reasonably explained, to negative its influence as a witness. See *Lafferty* v. *Turley*, 3 Sneed, 157; *Hammond* v. *Hopkins*, 3 Yer., 225; *Bolton* v. *Dickson*, 4 Lea, 569; *Caldwell* v. *Palmer*, 6 Lea, 658.

In *Parker* v. *Bethel Hotel Co.*, 12 Pick., 252, this Court quotes with approval the case of *Tazewell* v. *Sanders*, 13 Wall., 354, holding that "laches must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim." This, in our opinion, is the true foundation of the doctrine of laches—a presumption that arises through lapse of time or conduct of parties that the claim has been satisfied or abandoned. There is no question in this case that the husband's rights to this property *jure mariti* were never satisfied, and the crucial test and pivotal inquiry in this case is narrowed to the question of abandonment. The elements necessary to constitute an abandonment have long since been determined by this Court. To constitute an abandonment or waiver, there must be a clear, unequivocal, and decisive act of the party, showing a determination not to have the benefit in question, with a full knowledge of his rights in the premises. *Gentry* v. *Gentry*, 1 Sneed, 87; *Traynor* v. *Johnson*, 1 Head, 52; *Masson* v. *Anderson*, 3 Bax., 290; Schouler's Dom. Rel., Sec. 189.

We are of opinion that this complainant is not repelled by the application of any of these principles. His claim to the property was not against conscience. It was a right given him *jure mariti*. The facts upon which he makes his claim, or upon which the claim could be defeated, have not been lost by death of witnesses or great lapse of time. They are principally matters of record. His reasons

for not suing earlier are not only satisfactory but commendable. Such a suit, during the strained relations between this husband and wife, would have resulted in intensifying estrangement, permanent separation, and probable divorce. His wife was enjoying the rents of the land, and a Court of Equity, looking to the preservation of harmony between husband and wife, should approve rather that condemn. The facts found do not, in our opinion, constitute an abandonment. It might be further argued that the decree itself postpones, to an indefinite future, the adjustment of the rights of both husband and wife. They mutually postponed, he the assertion of his right of reduction to possession, she her right to an equitable settlement.

The contention of the defendants that the death of the wife and casting descent to the land bars recovery, is not supported by any authority cited or based upon any principle other than doctrine of laches. *Dyer* v. *Cornell*, 4 Bax., 359, is quoted as sustaining this proposition. That was case of sale of infant's land and conversion into money for maintenance of infant. She married and then died. Held, that money went to the husband as personalty. The Court said *arguendo:* "Even if it had remained realty, for how many generations or descents shall it wear that complexion? We think only to the first generation." Quoting *Hogel* v. *Hart*, 2 Bax., 473, which was a case determined entirely upon statute, as to property of lunatics. We do not think these

cases cited by counsel and the Court of Chancery Appeals sustain this proposition.

The only remaining question for determination is the contention of the defendant that complainant should be repelled because, had he asserted his rights during the life of the wife, her equity would have been settled upon her to the extent of the whole estate. Our conclusion is that this proposition may be conceded, but that the logical and legal effect of this concession does not now bar the husband's recovery. It is true that in making this settlement, the whole of the estate may be settled upon the wife and children, and it is immaterial by whom the application is made. *Phillips* v. *Hassel*, 10 Hum., 197; *Pillow* v. *Thomas*, 1 Bax., 122; *Murphy* v. *Green*, 2 Bax., 403. But no case has gone so far as to decree the provision after the husband has reduced the property to possession. Pomeroy Eq., Sec. 1116, note; Story's Eq., Sec. 1400; 2 Kent Com., Sec. 141; *Dearin* v. *Fitzpatrick*, Meigs, 559. Nor, upon death of wife, upon application of children, as they have no independent right to enforce her equity. Pomeroy Eq., Sec. 1118, note 2; *Lloyd* v. *Williams*, 1 Madd., 450; *De La Garde* v. *Lempriere*, 6 Beav., 344; *Hodgins* v. *Hodgins*, 4 Cl. & Fin., 323; *McCaleb* v. *Critchfield*, 5 Heis., 288.

But the main and controlling reason why this contention of defendant would not bar the husband's present recovery is, that had this equity been set aside, it would only have been for life of wife, with

remainder to husband, she leaving no issue. This is the settled rule. The English decisions are in accord that the settlement on the wife is always coupled with a limitation over to the husband, if she dies before him without leaving issue. This was the rule laid down by Lord Cranworth in *Carter* v. *Taggart*, 1 D. M. & G., 386, and in *Word* v. *Yates*, 1 Drewry & Small, 80, 84. Since then the question has been many times considered by the English Courts.

In *Spirett* v. *Willows*, L. R., 1 Chan. App., 520, Lord Chelmsford said: "There are numerous authorities on the subject, and the principle which I abstract from them all is this, that where a wife is declared to be entitled to a settlement, and the fund is settled under the direction of the Court, the ultimate limitation of the money, even in the event of her surviving her husband, will, in the absence of special circumstances, be to him. And this seems reasonable, because the fund belongs originally to him, and the Court will not deprive him of it, without doing that which is equitable, after providing for the wife and children."

In re Suggett's Trusts, L. R., 3 Chan. App., 215, was a case in which, on account of the husband's cruel conduct and intemperance, the whole of the wife's estate was settled on her, but with the usual limitation over for the husband. In the course of his judgment, Cairns, L. J., observed: "With respect to the form of the settlement, the principle

on which the Court acts is to let in the equity of the wife and children, and to that extent to exclude the husband's marital right. But, as soon as the equity is satisfied, the provisions of the settlement ought to end, and the marital right ought to return."

In the case of *Spirrett* v. *Willows*, L. R., 4 Chan. App., 407, the settlement was to the wife and children, with limitation over to assignee of the husband, who was a bankrupt; and *Walsh* v. *Watson*, L. R., 8 Chan. App., 482, by Lord Selbourne, is in accord with these cases, and limitation was over to the husband whether he survived or not.

In the case of *Croxton* v. *May*, L. R., 9 Eq., 404, all the important cases on the subject were reviewed, and the result was stated in these words: "The principle upon which this Court ought to proceed is, that you ought not to interfere with the marital right more than is necessary to give effect to the equity of the wife and children—that is to say, the right of the wife and children to have a provision out of the fund. The marital right ought not to be interfered with more than is necessary for that purpose. The logical and proper result of that principle is that the husband is to have the ultimate reversion, subject to the provision for the wife and her children." There the whole fund was given to the wife. *Murry* v. *Lord Elibank*, 1 Lead. Cas. in Eq., 629.

Says Mr. Pomeroy (Sec. 1118): "The latest decisions have settled the rule that the husband's mar-

ital rights should not be interfered with any further than is necessary to protect the wife's equity for herself and her children."

Lewin on Trusts (Sec. 743): "The wife's equity to a settlement does not depend upon her right of property in the subject-matter, for it must be enforced for the benefit of herself and children, and the amount is wholly discretionary with the Court. It is an obligation which the Court fastens not upon the property, but upon the right to receive it." Pomeroy Eq., Sec. 1114.

The result of the application of these principles to this case is (by giving this property to the husband now, upon the death of the wife without issue), to do what would have resulted had the husband filed bill during life of wife, and wife claimed settlement. Let decree be entered accordingly, reversing decree of the Court of Chancery Appeals, and for the complainant for the recovery of the property in controversy.

SNODGRASS, Chief Justice, and HU L. MCCLUNG, Special Judge, dissent.

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